In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE MIDWEST OIL COMPANY, ET AL., APPELLEES.

On Record Certified to the Supreme Court from the United States Circuit Court of Appeals for the Eighth Circuit on Appeal from the District Court of the United States for the District of Wyoming.

BRIEF AND ARGUMENT ON BEHALF OF THE APPELLEES.

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BRIEF AND ARGUMENT ON BEHALF OF THE APPELLEES.

STATEMENT.

The essential facts on which the following discussion will be based may be stated as follows:

On the *27th day of September, 1909*, with the approval, and pursuant to the direction, of the President, there was promulgated the following order:

"Temporary Petroleum Withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

Record, p. 8.

[Here follows a description of 3,041,000 acres of land.]

The described 3,041,000 acres of land included 2,871,000 acres in California, and 170,000 acres in Wyoming.

Appellant's Brief, p. 115.

On *March 27, 1910,* William G. Henshaw, Hetty T. Henshaw, Tyler Henshaw, William M. Fitzhugh, Mary E. Fitzhugh, Harry Chickering, Alla S. Chickering, and Henry D. Nichols (grantors of the appellees), designated in the bill as original claimants, entered upon a certain 160 acres of land in the State of Wyoming, included within boundaries described in said "Temporary Petroleum Withdrawal No. 5," and sank a well thereon to great depth, and on or before *May 5, 1910,* encountered large deposits of petroleum by means of said well, and thereupon filed their certificate

of location in the records of the County of Natrona, Wyoming, and, pursuant to the laws of the United States, duly located said lands now in controversy, being the Northeast Quarter of Section Eleven (11), Township Thirty-nine (39) North, of Range Seventy-nine (79) West, of the Sixth Principal Meridian, in the County of Natrona, State of Wyoming.

At the time of the location of said lands there was in force, and still remains in force, the following statutory provision:

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims. * * *"
>
> Act of February 11, 1897; 29 Stat. L., 526.

On *June 25, 1910,* there was approved by the President an act of Congress, entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases" (36 Stat. L., 847), which statute is set out at large in the bill. The first section of that act provided:

> "That the President may at any time in his discretion temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water power sites, irrigation, classifica-

tion of lands or other public uses, to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him, or by an act of Congress."

The second section of the act included a proviso as follows:

"Provided further that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands *after* any withdrawal of such lands made *prior* to the passage of this act." *

Record, p. 3.

Under date of *July 2, 1910*, with the approval of the President, there was promulgated another order of withdrawal, as follows:

"Order of Withdrawal.

Petroleum Reserve No. 8.

It is hereby ordered that those certain orders of withdrawal made heretofore:

On Sept. 27, 1909, and described as temporary petroleum withdrawal No. 5;

On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 6;

On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 7;

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* In all quotations in this argument *italics* are ours, unless otherwise noted.

On Oct. 30, 1909, and described as temporary petroleum withdrawal No. 8;

On Feb. 12, 1910, and described as tempoary petroleum withdrawal No. 13;

On April 8, 1910, and described as temporary petroleum withdrawal No. 14;

On June 18, 1910, and described as temporary petroleum withdrawal No. 17;

in so far as the same include any of the lands hereinafter described, be, and the same are hereby, ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled 'An Act to authorize the President of the United States to make withdrawals of public lands in certain cases,' approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows, to-wit:"

Record, p. 9.

[Here follows a description of 255,461 acres in the State of Wyoming, including the lands in controversy.]

The following questions are now for consideration by this court:

1. Whether the withdrawal order of September 27, 1909 (made without antecedent congressional authority), was effectual to prevent the lawful acquisition by qualified citizens of mining rights on mineral oil lands in Wyoming included within the lands described in the withdrawal order; and

2. Whether the act of June 25, 1910, or the withdrawal order of July 2, 1910, defeated the rights of the mining locators who had discovered petroleum upon, and had located, the lands in controversy as early as May 5, 1910.

The District Court decided these questions of law in favor of the present appellees and against the government, and entered a decree dismissing the plaintiff's bill. The appellees now contend that that decree should be affirmed.

ARGUMENT.

The appellees contend that the order of withdrawal made by the Secretary of the Interior, with the approval of the President, under date of September 27, 1909, was made without authority of law, and was in every respect null and void. The contention of the appellees may, in general, be condensed into the following propositions:

1. Congress has by law provided:

(a) That "*all valuable mineral deposits* in lands belonging to the United States * * * are hereby declared to be free and *open to exploration and purchase,* and the lands in which they are found *to occu-*

pation and purchase * * * under regulations prescribed by law. * * * "

Rev. Stat., sec. 2319.

(b) That "claims usually called 'placers,' including *all forms of deposit*, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; * * * ."

Rev. Stat., sec. 2329.

(c) "That any person authorized to enter lands under the mining laws of the United States *may enter* and *obtain patent* to land containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Act of February 11, 1897; 29 Stat. L., 526.

2. (a) On and prior to March 27, 1910, the lands in controversy were lands belonging to the United States in which were found valuable mineral deposits —to-wit, deposits of petroleum — and were chiefly valuable therefor.

(b) The original claimants were and are persons authorized to enter lands under the mining laws of the United States.

(c) On or before May 5, 1910, the original claimants discovered said valuable mineral deposits, and duly located the lands containing the same in the manner required by law.

3. Temporary Petroleum Withdrawal No. 5, of September 27, 1909, was intended to, and did, reach all the then known public mineral-oil domain of the United States, and, if valid, had the effect of suspending the operation of the act of February 11, 1897, above quoted.

4. Neither the President nor the Secretary of the Interior has any power to suspend the operation of a law of the United States, unless authorized by statute so to do.

5. Prior to June 25, 1910, Congress had given no authority to the President or Secretary of the Interior to withdraw petroleum or other mineral-oil lands of the United States from the operation of the laws above mentioned.

Therefore:

(1) The attempted executive withdrawal of September 27, 1909, was null and void; and

(2) The original claimants (grantors of appellees), by exploration of said lands and the discovery of petroleum thereon in paying quantities, and the completion of said discovery and the location of said claim prior to the approval of the act of June 25, 1910, acquired vested rights in the lands so located and on which such discovery was made.

The question submitted to the District Court in this cause was simply as to the sufficiency of the bill. The point was raised by a motion to dismiss, and decree was entered upon that motion, dismissing the bill. Strictly speaking, therefore, the record only presents the law question as to whether the bill upon its face, unaided by any evidence, presents a cause of action. The appellant relies upon numerous documents

not appearing in the record, of which it asks this court to take judicial notice, explanatory of motives which actuated executive officers in recommending, and the President in approving, the order of withdrawal now under consideration.

In view of the broad scope and great importance of the principle involved in this cause, we shall discuss the case on the theory that this court will take no narrow view of the subject, but will welcome light from all sources bearing upon the main question involved, being as to the power of the President prior to the act of June 25, 1910, to withdraw the public mineral-oil domain of the United States from the operation of existing laws, but with special reference to public oil lands in Wyoming. No other lands are involved in this case. We shall, therefore, in the following discussion freely refer to the documents cited by appellant, which it submits to the judicial notice of this court.

I.

The scope and character of the withdrawal order of September 27, 1909, shows that it was not an appropriation of specific lands for public use, but it was avowedly for the purpose of preventing the acquisition of public oil lands by qualified citizens under existing statutes, pending efforts to obtain a change of law.

1. *The Scope and Character of the Order of Withdrawal.*

The language of the withdrawal order is as follows:

> "In aid of *proposed legislation* affecting the use and disposition of the petroleum deposits on the public domain, *all public lands* in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the *mineral* or nonmineral *public land laws.*"
>
> Record, p. 8; fol. 8.

The order itself purports to cover all public lands within described areas of 3,041,000 acres. The bill itself alleges that the lands in controversy, "in common with many other tracts of the public lands of the United States," were withdrawn from mineral location.

Record, p. 2; fol. 2.

The withdrawal of these oil lands originated in recommendations of the Geological Survey. There has been issued by the United States Geological Survey its Bulletin No. 537, relating to the classification of the public lands, and that Bulletin reviews the subject of the withdrawal of oil lands, including the withdrawal in controversy. The Director of the Geological Survey, Mr. George Otis Smith, at page 38 of said Bulletin, reviews the action of the Interior Department in the withdrawal of oil lands from *agricultural* entry in the years 1907 and 1908; and he then makes the following statement:

> "Within a short time it became apparent that the situation was only partly covered by withdrawing oil lands from *agricultural*

entry. The inadequacy of the placer law and its inapplicability to oil lands was clearly recognized. The law was framed to apply to solid minerals; when applied to fluids, such as oil and gas, it at once led to many abuses. Drilling along the boundaries of one claim in order to draw off oil or gas beneath a neighboring claim forced activity in drilling which resulted in production far greater than the demands of the market. The requirement of discovery as a prerequisite to title also forced development and overproduction. It became more and more apparent that oil and gas should be disposed of in terms of barrels or cubic feet rather than in terms of acres. These considerations, together with the advisability of retaining a supply of fuel oil for the use of the Navy, caused the Geological Survey to urge the *suspension of all forms* of entry on Government oil lands pending the enactment of new legislation by Congress. In consequence Secretary of the Interior Ballinger on *September 27, 1909*, withdrew from all forms of entry, location, or disposition *all public lands believed to contain valuable deposits of oil or gas.* As information has since been obtained indicating other public lands to be valuable for these minerals, *they also have been withdrawn* from all forms of disposition under the mineral or nonmineral land laws. * * *

> A number of bills providing for the disposal of oil and gas deposits have been introduced in Congress, but none have yet been enacted into law, so that the petroleum withdrawals continue in force and *new ones are being made as occasion arises.*"

Petroleum Withdrawal No. 5 was drafted, even as to its form, by the Geological Survey, and became an effectual executive order merely by the approval endorsed upon that recommendation by the Acting Secretary of the Interior.

Record, p. 8; fol. 8.

President Taft himself stated the scope and reasons for this withdrawal in his message to Congress of December 6, 1910, p. 98; see also Appellant's Brief, p. 117. In that message he incorporated an address which he had made on September 5 of the same year, in which he said:

> "In *September, 1909* I directed that *all public oil lands*, whether then withdrawn or not, should be withheld from disposition pending congressional action, *for the reason* that the existing placer mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it *seemed* desirable to reserve *certain* fuel-oil deposits for the use of the American Navy. Accordingly, the form of all existing withdrawals was changed and new withdrawals aggregating 2,750,000

acres were made in Arizona, California, Colorado, New Mexico, Utah, and Wyoming."

He then speaks of subsequent restorations and of new withdrawals, with the conclusion that on November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres.

By reference to the order of Withdrawal No. 8, of July 2, 1910, we find that the only order of withdrawal of oil lands made in September, 1909, was the order of September 27, which is now under consideration.

We have in these statements direct, positive evidence, of which this court will take judicial notice, that it was the intent that the withdrawal should cover *all* public oil lands, and the dominant purpose in making the withdrawal is shown to rest upon the executive opinion that the existing placer-mining law did not provide the best method for the disposition of such lands. We have the direct declaration of the Director of the Geological Survey, who recommended the withdrawal, and the very positive statement to the same effect by the President himself, that this order of September 27, 1909, was intended to cover *"all* public lands believed to contain valuable deposits of oil or gas, and that as other lands were found to be valuable for these minerals they too were withdrawn from all forms of disposition under the mineral or non-mineral land laws." The entire mineral-oil domain of the United States is, upon the recommendation of one bureau chief, and without any suggestion of previous congressional authority, withdrawn from the operation of existing laws.

2. *The Purpose of the Withdrawal.*

It was the view of certain executive officers that there should be a change of law in reference to the method of acquisition of public oil lands.

This suggested change was expressed in President Roosevelt's message of May 4, 1906, where he said:

> "The time has come when no oil or coal lands held by the government * * * should be alienated * * * the lands should be leased only on such terms and for such periods as will enable the government to keep entire control thereof."
>
> Cong. Rec., Vol. 40, Part 7, p. 6358.

A like suggestion was expressed in the report of the Secretary of the Interior for the year 1909, in the following words:

> "No legislation exists for the entry of oil and gas lands other than the general mining laws of the United States, which are not adaptable to the disposition of lands containing mineral oils and gas."
>
> Report, p. 11.

Later the same idea was set forth in President Taft's message of January 14, 1910, in which he asked Congress "for the enactment of laws amending the *obsolete statutes* so as to obtain governmental control

over that part of the public domain in which there are valuable deposits of coal, of oil, and of phosphate."

Message, p. 4 (61st Cong., H. R. Doc. 533).

Appellant's Brief, p. 116.

In like manner it was set forth in President Taft's message of December 6, 1910, where he says:

> "The needed oil and gas law is essentially a leasing law. In their natural occurrence, oil and gas cannot be measured in terms of acres like coal, and it follows that exclusive title to these products can normally be secured only after they reach the surface. Oil should be disposed of as a commodity in terms of barrels of transportable product rather than in acres of real estate."

Message (appendix), 98.

Appellant's Brief, p. 117.

The dominant purpose of the withdrawal was manifestly to withhold public oil lands from the operation of existing laws of Congress, because executive officers were of the opinion that the law ought to be different from what it was. It was clearly intended to deprive citizens of the benefit of existing statutes until Congress should make a change in legislative policy and enact new and different laws. It was, therefore, the suspension of the operation of existing laws, and was intended to be such a suspension until Congress should enact some other law that should agree with the executive view of what the govern-

mental policy should be in reference to the disposition of public oil lands.

The appellant attempts to justify this total withdrawal of the entire public mineral-oil domain from the operation of existing laws by the fact that in discussions between executive and administrative officers there was presented, as an incidental object to be accomplished, a so-called public use—to-wit, the assuring of a supply of fuel oil for the uses of the national navy. No such purpose was declared in the order of withdrawal. The only purpose set forth in that order was "in aid of proposed *legislation* affecting the use and disposition of the petroleum deposits in the public domain." The withdrawal made was not a reservation or appropriation of oil lands for uses of the navy. Its object was to withhold the land from any alienation until there could be *legislation*, which legislation, it was expected, would provide for the use and disposition of these petroleum deposits.

Before it would be possible for such lands to be utilized for naval purposes, an entire change of legislative policy would be necessary. The government has always been in the habit of buying its fuel supplies upon the market, and not producing them from its public lands by its own agencies. But, in order that the so-called public use—to-wit, the uses of the navy—may justify the withdrawal of mineral-oil lands from the operation of existing laws, it manifestly requires a *legislative change* in a long-continued government policy.

This situation is recognized by executive officers in the various communications which the appellant submits to the judicial notice of this court, and is also apparent from the action taken by the President.

Mr. George Otis Smith, Director of the Geological Survey, in his letter to the Secretary of the Interior of September 17, 1909, says:

> "I would therefore renew my recommendation that *pending the enactment of adequate legislation on this subject* the filing of claims to oil land in the State of California be suspended."
>
> House Hearings on H. R. 24070, pp. 97-98.

The Secretary of the Interior, in his letter of the same date (September 17) to the President, says:

> "The time appears opportune *for legislative action* that will assure the conservation of an adequate supply of petroleum for the government's own needs. *This legislation* should give authority to fix the terms of disposition of public oil lands so as to provide for the future demands of the Navy, * * *.
>
> In aid of *such legislation*, and, indeed, as essential to the accomplishment of its purpose, all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry or disposal, including mineral entry."
>
> Id., pp. 98-99.
>
> Appellant's Brief, p. 114.

Acting Secretary Pierce, in his telegram to Secretary Ballinger of September 26, 1909, says:

> "My withdrawal prevents all forms of acquisition in future, and holds the land in statu quo *pending legislation.*"

The Secretary of the Interior, in his report for 1909 (p. 11), says:

> "I desire to call attention to the importance of asking *Congress to authorize* the Executive to reserve certain areas of these lands for the purpose of affording a supply of fuel oil for the future use of the Navy."
>
> Appellant's Brief, p. 115.

The President, upon these recommendations, authorized the withdrawal order solely in aid of *proposed legislation.*

It is very clear from these citations that even in the view of executive officers the reservation of mineral-oil lands for naval purposes was not a "public purpose" for which reservation or appropriation could be immediately made, but that a change of laws was necessary in order to make it such a public purpose. *Legislative* action of the character suggested had statutory precedent; as, for illustration, the act passed by Congress in 1817 (3 Stat. L., 347), giving to the President authority to make reservations of public lands to supply timber for naval purposes.

The history of the act last cited, and of subsequent acts upon the same subject, furnishes valuable precedents for the course which should have been pursued in this case, if oil lands were to be reserved for the use of the navy.

In the Fourteenth Congress Senator Morrow introduced into the Senate, and the Senate adopted, a resolution as follows:

> "Resolved that the Committee on Public Lands be directed to inquire into the expediency of providing *by law* for the reservation from sale of such portions of the public lands producing the live oak and red cedar timbers as may be necessary to afford a sufficient supply of those timbers for public naval architecture, and also the measures proper for preventing waste and damage on the same, and that they report by bill or otherwise."
>
> Annals 14th Congress, Second Session, p. 37.

Pursuant to a report presented in accordance with this resolution, the act of March 1, 1817, was enacted (3 Stat. L., 347), the first section of which reads as follows:

> "That the Secretary of the Navy be authorized, and it shall be his duty, under the direction of the President of the United States, to cause such vacant and unappropriated lands of the United States as produce the live oak and red cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of the said timbers, as in his judgment may be necessary to furnish for the navy a sufficient supply of the

said timbers. The said Secretary shall have power to employ such agent or agents and surveyor as he may deem necessary for the aforesaid purpose, who shall report to him the tracts by them selected, with the boundaries ascertained and accurately designated by actual survey or water courses, which report shall be laid before the President, which he may approve or reject in whole or in part; and the tracts of land thus selected with the approbation of the President, shall be reserved unless otherwise directed by law, from any future sale of the public lands, *and be appropriated to the sole purpose of supplying timber for the navy of the United States: Provided*, That nothing in this section contained shall be construed to prejudice the rights of any person or persons claiming lands which may be reserved as aforesaid."

In the act of March 3, 1827 (4 Stat. L., 242), it was enacted by section 3 of the act:

"That the President of the United States be and he is hereby authorized to take the proper measures to preserve the live oak timber growing on the lands of the United States, and he is also authorized to reserve from sale such lands belonging to the United States as may be found to contain live oak or other timber in sufficient quantity to render the same valuable for naval purposes."

By act of March 2, 1831 (4 Stat. L., 472), penalties were imposed for the wanton destruction of any live oak or red cedar trees or other timber—

> "on any lands of the United States which *in pursuance of any law passed or hereafter to be passed* shall have been reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the navy of the United States."

The provisions of the act last mentioned have become incorporated in section 2461 of the Revised Statutes, which provides penalties for cutting timber on any lands of the United States "which in pursuance of any law passed or hereafter to be passed have been reserved or purchased for the use of the United States," etc. In this history of the reservation of timber for naval uses we find a careful observance of the constitutional distribution of powers as between the legislative and executive departments, and the action then taken furnishes instructive precedents for the course that should have been pursued in the case now under consideration. Under these statutes Congress made provision, in advance of executive action, giving power to the President to reserve lands for naval purposes. The action taken is inconsistent with any *implied* power of the President to reserve lands without the aid of previous legislation by Congress.

The appellant has appended to its brief, among other documents, a table of bills introduced into Congress relating in one way and another to the disposition of public lands. They are twenty-three in number, running from March 22, 1909, to April 18, 1910.

Any member of Congress may introduce a bill upon any subject, and it is very apparent that the mere pendency of bills for consideration by Congress is in itself no suggestion of the congressional purpose; and yet a congressional purpose cannot be manifested except by a bill which is ultimately enacted into law. Now, it will be observed by an examination of this list of twenty-three bills so listed by appellant that there is not one which purports to provide for a change in the policy of the government in reference to the supply of fuel for naval uses. This is admitted by appellant (Brief, p. 13).

That the uses of the navy, in any event, constitute but a small factor in the withdrawal of the public oil lands from location or entry becomes very apparent when we see what was done after the enactment of the law of June 25, 1910. It will be remembered from citation already made that in September, 1909, the President had directed that *all* public oil lands should be withheld from disposition, and that on November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres. But the Director of the Geological Survey, in Bulletin 537, already cited, at page 39, says:

> "The need of the Navy for a supply of fuel oil has recently been more strongly recognized, the battleships last authorized being designed to burn oil exclusively. *Fully to insure the Nation an adequate supply of fuel oil*, two naval petroleum reserves aggregating 68,249 acres and estimated to contain at least 250,000,000 barrels of oil have been created in the San Joaquin Valley fields of California, one under date of September 2,

1912, and the second under date of December 13, 1912."

It would seem, therefore, that out of the 4,654,000 acres which had theretofore been withdrawn from location, the relatively trifling amount of 68,249 acres was sufficient "fully to insure the Nation an adequate supply of fuel oil." In other words, less than one and one-half per cent of the total withdrawals made was amply sufficient to assure the nation an adequate supply of fuel oil for naval uses. The remaining ninety-eight and one-half per cent of the total withdrawals must, therefore, rest solely upon the proposition that in the opinion of the executive the existing mining laws were not adapted to the disposition of oil lands, and that no entry should be made under the same pending an effort to change such laws.

Not only is this true, but, whether we take the one purpose or the other—the purpose to change the method of permitted acquisition of oil lands, or the purpose of ultimately reserving oil lands for the uses of the navy—in either and in both events what was desired and what was requisite to accomplish the executive intent was a *change of existing law*. But the question of a change of existing law is a question exclusively for Congress, as we shall hereafter more fully discuss. And when the President by executive order withholds the entire public mineral-oil domain from entry under existing laws, because he thinks those laws ought to be changed, the inevitable conclusion is that he is attempting to suspend the operation of laws which Congress has enacted, because he believes such laws unwise.

II.

The public oil lands of Wyoming included within the withdrawal order of September 27, 1909, were not intended to be reserved for naval uses, and the only reason for their withdrawal was to prevent their acquisition by qualified citizens under existing statutes.

The little tract of 160 acres in controversy in this action was not in itself and by itself selected as a specific object of withdrawal. It happens to be included within the boundaries of 170,000 acres of Wyoming lands withdrawn by the order of September 27, 1909, and within the 255,461 acres in Wyoming covered by the withdrawal of July 2, 1910.

If now we look to the various documents which the appellant brings before this court for consideration, we find nothing whatever to suggest the use of Wyoming oil lands as a reservation for the production of oil for naval uses. And, on the contrary, these documents show that the only lands contemplated to be used for such purposes were lands in California.

The lands in controversy are situated in the State of Wyoming, 1,500 miles from tide-water. But in the State of California, on the Pacific coast, close to tide-water, is situated an immense area of valuable oil-bearing land—a fact already then well known to the government through the reports of the Geological Survey. And it was to these lands in California that all the recommendations of executive and administrative officers as to reservations for naval use were directed.

On February 24, 1908, Director George Otis Smith recommended that the filing of claims to oil lands in the State of *California* be suspended in order

that the government might continue ownership of valuable supplies of liquid fuel in that region.

Appellant's Brief, p. 108.

Under date of September 17, 1909, in a letter to the Secretary of the Interior, Director Smith, referring to instructions which had been previously issued to registers and receivers to withhold oil lands from *agricultural* entry in *California*, makes this statement:

> "The area of oil land affected by this action is about 427,000 acres, to at least 40 per cent. of which the government retains title. In several townships * * * there are compact areas of unappropriated oil land, each including from 6 to 16 contiguous sections."

Appellant's Brief, p. 111.

In a letter of the same date to the President, the Secretary of the Interior refers to the withdrawal of 430,000 acres of oil land in *California* from agricultural entry, and states:

> "Furthermore, there is at present withdrawn in *California*, pending examination and classification by the Geological Survey, which work is now in progress, approximately 1,650,000 acres, of which 1,250,000 acres are withdrawn from all entry."

Appellant's Brief, pp. 113, 114.

By letter from the Acting Secretary of the Navy to the Secretary of the Interior, of June 25, 1912, he says:

> "I am informed that there is in *California* on public lands withdrawn from entry oil estimated at four billion barrels."

He then further says:

> "This department therefore earnestly requests the co-operation of the Department of the Interior to secure a definite reservation for the Navy, by Executive order, of oil-bearing public lands *in California* sufficient in extent to insure a supply of 500,000,000 barrels."

Appellant's Brief, pp. 122, 123.

The two withdrawals that were in fact made for naval uses were of lands in *California*—one under date of September 2, 1912, and the other under date of December 13, 1912, and aggregating 68,249 acres, hereinabove mentioned. (Bulletin No. 537, p. 39.)

In all the recommendations preceding the withdrawal order of September 27, 1909, there was no suggestion of the necessity of a reservation for naval uses of any oil lands in Wyoming, and the Wyoming lands are brought within the scope of the withdrawal order only by the list furnished by the Director of the Geological Survey, and incorporated in the withdrawal on September 27.

The recommendation by the Secretary of the Interior to the President, under date of September 17, 1909, related solely to oil lands in California.

Appellant's Brief, p. 112.

And, after referring specifically to these California lands, and at the conclusion of his letter, the Secretary says:

> "It is believed that such legislation would not interfere with the profitable development and utilization of the *California* oil pools.
>
> In aid of such legislation, and, indeed, as essential to the accomplishment of its purpose all the lands *hereinbefore mentioned* should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry."
>
> Appellant's Brief, p. 114.

The lands here referred to as "hereinbefore mentioned" were California lands only. There was no allusion to lands in Wyoming.

Immediately after sending that letter, it seems that the Secretary went west and met the President, who was then on a journey, at Salt Lake City, and from there, on September 26, wired to Acting Secretary Pierce:

> "Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation."
>
> Appellant's Brief, p. 115.

And thereupon the Director of the Geological Survey prepared the order of withdrawal, and, in doing so, included the oil lands in Wyoming, which had not been covered by any recommendations or correspondence.

In the light of the preceding quotations, there is no doubt as to the meaning of the Secretary of the Interior and the President in their recommendations made to Congress. In the report of the Secretary of the Interior for 1909, after giving a table of withdrawals of oil lands with a view of obtaining new legislation from Congress, he says:

> "I desire to call attention to the importance of asking Congress to authorize the Executive to reserve *certain* areas of these lands for the purpose of affording a supply of fuel oil for the future use of the Navy."
>
> Report, p. 11.

And the President in his message of December 6, 1910, already quoted, stated as a "further reason" for his recommendation of additional legislation that it seemed desirable to reserve *certain* fuel oil deposits for the use of the American navy. In both cases it is apparent from the associated documents that the "certain areas" and the "certain fuel oil deposits" referred to were located in the State of *California*, and were none of them located in the State of Wyoming.

All known oil lands in Wyoming had been withdrawn from *agricultural entry* as early as April 1, 1903, and the continuance of the withdrawal was approved by the Acting Secretary of the Interior on July 26, 1909. These withdrawals were "*in order*

that parties might have opportunity to develop the land for alleged oil deposits."

(See Second Appendix, *post* p. 173.)

There is nothing whatever alleged in the bill in this case, there is nothing whatever set forth in any of the documents of which the court is asked to take judicial notice, to show that any of the Wyoming oil lands were desired by the executive department to be reserved for naval uses of the government. The conclusion seems inevitable that, so far as the lands in controversy are concerned, the only purpose of the withdrawal order was to prevent the alienation of these oil lands under the methods then provided by law, and to prevent their acquisition by citizens until the laws should be changed.

In the following discussion it is an order of this character that we have to consider; and the actual question before us really is: Did the President, prior to the act of June 25, 1910, have lawful power to withdraw the *entire public mineral-oil domain in the State of Wyoming* from the operation of the existing laws merely because, in his opinion, such laws did not provide the best method for the acquisition of oil lands by qualified citizens? Whatever other considerations may affect cases relating to *California* lands, the one question in *this case* is: Did the President have the power to deprive citizens of rights given them by law, pending his efforts to obtain a change of law as to the method of private acquisition of public mineral-oil lands?

III.

The President has no power to change, or to suspend the operation of, a law of the United States.

This proposition, under our form of government, would seem to be axiomatic; and yet it is manifest that the withdrawal order of September 27, 1909, was an attempt so to suspend the operation of laws of Congress.

The *law* says that all mineral lands *shall* be open to exploration, occupation, and purchase. The *order* says that the mineral lands mentioned therein, covering the entire known mineral-oil domain, and including the lands here in controversy, shall *not* be open to exploration, occupation, or purchase.

The law says that any person authorized to enter lands under the mining laws of the United States *may* enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

The President's order says that, although a person is so authorized, yet he shall *not* make any form of location, settlement, selection, filing, entry, or purchase under the mineral laws of the United States as to any of the lands described in the order, meaning all lands then known to contain petroleum.

Existing legislation authorized such entries upon public lands. The President's order prohibited such entries pending *prospective* legislation.

President Taft himself fully understood that withdrawal orders of this character had the effect "*to suspend the action of the existing laws*," for he

subsequently used these very words in reference to like withdrawals.

Message of December 6, 1910, p. 57.

The general principles applicable to this question were enunciated very early in the history of the government. In a case before this court it appears that the Postmaster General had refused to recognize an award made pursuant to statute by the Solicitor of the Treasury, and this court, when the question came before it, stated one of the arguments in favor of the Postmaster General, and answered it in the following manner:

> "It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.
>
> To contend that the obligation imposed on the President to see the laws faithfully

executed implies a power *to forbid their execution*, is a novel construction of the constitution, and entirely inadmissible."

Kendall vs. United States, 12 Peters, 524, 612-613.

See also:

Marbury vs. Madison, 1 Cranch, 137, 166.

"Our government being a government of laws, it speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents."

United States vs. Nicoll et al., 1 Paine, 464; 27 Fed. Cases, No. 15879.

"The government of the United States is one of delegated and limited power; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted."

Ex parte Merryman; Taney, 246; 17 Fed. Cases, No. 9487.

In *Deffeback vs. Hawke*, 115 U. S., 392, 406, this court, speaking of the authority of the Land Department (over which the Secretary of Interior presides) over patents to mineral lands, said:

"The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of convey-

> ance, with recitals showing a compliance with the law and the conditions which it prescribed. * * * The act of Congress of May 10, 1872, contemplates the purchase of the land on which valuable mineral deposits are found; and its provisions in this respect are retained in the Revised Statutes, Sec. 2319."

And in the later case of *Shaw vs. Kellogg*, 170 U. S., 312, 337, speaking on the same subject, the court said:

> "We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. *Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal.*"

In a later case, speaking of the Secretary of the Interior himself, this court has used some very emphatic language in reference to his power to make regulations relating to the use of timber from the public lands under a statute which provided that all citizens of the United States resident in certain states and territories were authorized and permitted to fell and remove timber from public mineral lands for building, agricultural, mining, or other domestic purposes. The Secretary, by his Regulation No. 7 under this act, had provided that "no timber is permitted to be used for smelting purposes, smelting being a sepa-

rate and distinct industry from that of mining." The Supreme Court held otherwise, and uses this language:

> "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; *it is legislation*. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, *not to take it away*. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation."
>
> United States vs. United Verde Copper Co., 196 U. S., 207, 215.

See also:

> Morrill vs. Jones, 106 U. S., 466.
>
> U. S. vs. Eaton, 144 U. S., 677.
>
> Williamson vs. U. S., 207 U. S., 425, 462.

Referring to Revised Statutes, sections 441, 453, etc., this court has very recently said:

> "We insert the sections in the margin. It will be seen that they confer administra-

tive power only. This is indubitably so as to Sections 161, *441*, *453* and 2478; and certainly under the guise of regulation, *legislation cannot be exercised.* * * * It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Section 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Section 2291 requires, why not other conditions, *and the disposition of the public lands thus to be taken from the legislative branch of the Government and given to the discretion of the Land Department.*"

U. S. vs. George, 228 U. S., 14, 20.

At this early stage of the argument we respectfully submit: (1) That the withdrawal order of September 27, 1909, was plainly *legislative* in character—it was not "regulation." (2) That the power even to make regulations respecting the public lands rests exclusively in Congress. (3) That executive officers cannot make regulations respecting such lands, except to the extent that Congress by statute has conferred that power upon them. (4) That Congress had not (prior to June 25, 1910) conferred any authority that would sustain executive orders of the character now under discussion. (5) That the act of June 25, 1910, was not in terms or effect a ratification of preceding withdrawals, but merely author-

ized withdrawals *in futuro*. (6) That the withdrawal order of September 27, 1909, was a usurpation of legislative power—was an attempt to suspend the operation of then existing laws—and was outside the range of any constitutional or statutory authority vested in the President.

These contentions will be further elaborated in the pages following.

IV.

Under what sanction and to what extent has the President or the Secretary of the Interior the power to withdraw public lands from NON-MINERAL entry under existing laws?

The case under discussion relates ultimately only to the power of the President to withdraw public oil lands from mineral entry under existing laws, and, as we shall hereafter see, there is a sharp and vital distinction in this respect between mineral and non-mineral rights under the law. But, in view of contentions on behalf of the appellant as to "implied" or "inherent" powers of the executive, it seems necessary first to investigate and analyze the power, and the source of the power, of the President as to withdrawals most frequently made in the past, and these relate to non-mineral land.

The counsel for appellant contend for "implied" power in the President to deal with the public lands in ways not authorized by Congress. They point, indeed, to no clause or single word of the Constitution from which such implication can be derived. In an indefinite and uncertain way they argue that, *by*

necessity, this power so to deal with the public lands vests in the chief executive.

This contention is in violation of principles which have become fundamental in our jurisprudence. It violates the principle long ago announced by Chief Justice Taney, that the government of the United States is one of delegated and limited authority; that it derives its existence and authority from the Constitution, and that neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted. (*Ex parte Merryman, supra.*) Our government speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents. (*U. S. vs. Nicoll, supra.*)

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1. *The Executive Power Is Dependent on Congressional Authority.*

In considering the constitutional distribution of governmental powers as between the executive and the legislative departments, there may be some subjects which are not clearly defined, and which require elaborate consideration to determine whether they lie within the one department or the other. But there is probably no subject upon which the delimitation of powers is more clearly expressed than in relation to the public lands. It is a subject on which the Constitution makes express declaration, and the constitutional provision has been frequently discussed and applied by this court. Its meaning is not ambiguous.

It is provided by the Constitution of the United States that—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States."

U. S. Constitution, Art. IV, sec. 3.

Construing this provision of the Constitution, this court has said:

"The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word *lands*. And Congress has the same power over it as over any other property belonging to the United States; and this power *is vested in Congress* without limitation."

U. S. vs. Gratiot, 14 Pet., 526, 536-537.

"No appropriation of public land can be made for any purpose but by authority of Congress."

U. S. vs. Fitzgerald, 15 Pet., 407, 421.

"But public and unoccupied lands to which the United States have acquired title * * * Congress, under the power conferred upon it by the constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the *exclusive* right to control and dispose of, as it has with regard to other property of the United States."

Van Brocklin et al. vs. State of Tennessee et al., 117 U. S., 151, 168.

"The constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an *exclusion* of all other authority over the property which could interfere with this right or obstruct its exercise."

Wisconsin R. R. Co. vs. Price County, 133 U. S., 496, 504.

"With respect to the public domain the constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

Gibson vs. Chouteau, 13 Wall., 92, 99.

From this plain constitutional provision, as definitely construed by this court, it would seem incontestable that any executive power to deal with the public lands must find its sanction in some law of Congress; that any executive power of restricting the acquisition of such lands by private citizens in the manner permitted by law must find its support in some congressional act which directly or by necessary implication vests such power of restriction in the Executive.

There have been many laws which directly granted such power as to specific *non-mineral* lands. There have been many laws which by necessary implication have vested this power in the Executive under defined limitations. There have been many laws which gave the Executive *discretion* to withdraw lands from entry and to determine what particular lands should be designated for withdrawal. But in all cases the source of the power, whether express or implied, is always found in some congressional action. We confidently contend that there is no independent "inherent" or "implied" authority in the Executive so to deal with public lands. Undoubtedly the congressional authority must often be "construed," and as the executive department has the duty of executing the law and of fulfilling the congressional mandate, the duty of construction first rests upon executive officers. Their construction may in the end prove wrong, but, until corrected by judicial decision, will stand. But whether the congressional mandate be rightly or wrongly *construed*, the executive action assumes previous legislative authority. It finds its sanction only in the action of Congress.

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2. *Views of Executive Officers as to the Source of Their Authority to Make Withdrawals of Public Lands.*

Except for certain doctrines (hereinafter mentioned) first announced during the administration of President Roosevelt, the view of executive officers has been that the power to withdraw public lands from

the operation of existing laws depended upon some authority of Congress.

Mr. Hoke Smith, Secretary of the Interior, in one decision said:

> "In view of the provision in Article 4 of the Constitution, conferring upon Congress the exclusive 'Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' it would seem that there ought to be some legislation, which, either by expression or clear implication, confers upon the executive so important a power as that of withholding public lands from the operation of laws, relating to their disposal, whenever, in the discretion of the executive, it is thought proper to do so—a disposal, be it remembered, expressly reserved by the Constitution to the Congress itself. But in my researches I have not been able to find such legislation.
>
> So great is the power claimed, so far reaching and dangerous may be the results of its exercise, that if the matter were submitted to me as an original proposition, I do not think that I would be warranted in ordering such a withdrawal, in the absence of legislation and entirely upon a supposed power inherent in the Secretary of the Interior."
>
> Northern Pacific R. C. Co. vs. Davis, 19 L. D., 87, 88 (July, 1894).

Secretary Lamar, afterwards a Justice of this court, in an earlier case uses this language:

> "Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. * * *
>
> Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity lands from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands."
>
> Atlantic & Pacific R. R. Co., 6 L. D., 84, 87-88 (August, 1887).

Secretary Vilas, in overruling a withdrawal made by the Acting Commissioner of the General Land Office, speaks as follows:

> "The extent to which the supreme court has gone in its decisions, and the extent which the reason of the thing supports, appears to be that the President may, in execution or furtherance of a public purpose committed, generally or specially, *by Congress to the Executive* to effectuate, when in his judgment such action is desirable to the accomplishment of that purpose and will not infringe any limiting provision of statute gov-

erning the particular case, withdraw or withhold by his order any portion of the public domain from the operation of the general laws for its disposition, and devote it to such public use subject to review by Congress. * * * The principle does not, however, contemplate an arbitrary or capricious suspension of the statutes, much less the contravention of a particular mandate, expressed or clearly implied, even by the President's direct act. But it ought not to be presumed, and it seems to me it cannot rightfully be, to support the act of an inferior executive officer, that the President of the United States directed the withdrawal of public lands *beyond the clearly expressed purpose of a statute* or contrary to the clear implication of the negative force of a statute. Such a presumption cannot be rightfully imputed to him, whose official oath obliges, and whose highest function is, to faithfully execute the laws; and if he himself were to make a withdrawal under such circumstances, its validity would be open at least to grave question."

Northern Pacific R. R. Co. vs. Miller,
7 L. D., 100, 112 (August, 1888).

In an opinion rendered by Mr. Knox, when Attorney General, he discussed the control of the public lands, and as to the power of exclusion of citizens therefrom, and, among other things, he says:

"Such right of control and exclusion is incident to ownership and is a part of that

which the owner owns with the land. But it does not follow from this that the Secretary of the Interior may exercise this right of control which resides in the government and may be exercised by Congress. The powers of the head of a department are limited, and are to be exercised generally, and only for the accomplishment of some end or purpose prescribed by law or usage."

Again he says:

"But while Congress might exercise this incident of ownership, it is manifest that the Secretary of the Interior cannot without express authority of law change this long settled policy of the government in favor of the people by rules and regulations forbidding that access to the public domain which this policy has so long permitted, or for purposes within that permission, or not violative of any law."

23 Opinions of Attorneys General, pp. 589, 590.

It remained for a recent Secretary of the Interior to set forth in extreme form the opposite contention.

Secretary Garfield, in his report for the year 1908, uses the following language:

"The public domain has been placed by Congress under the Interior Department, and ample authority is vested in the Chief Executive and the Secretary of the Department to

take such action as is necessary to care for the public domain. During many years the Executive has, in the exercise of this general authority, withdrawn at different times and for various purposes areas of the public domain, and for the time being prevented those areas from being entered for private use.

Full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed wholly by the discretion of the Executive, unless any specific act has been *prohibited* either by the Constitution or by legislation."

Report of Secretary of Interior (1908), p. 10.

This is a very remarkable utterance. No authority can be found in support of the proposition that *full power* under *the Constitution* was vested in the executive branch of the government as to these lands, and the theory that the executive may act concerning them at his discretion, *unless prohibited* by the Constitution or by legislation, is a unique doctrine in American history. The appellant is now driven, however, to adopt the same doctrine, although stating it less baldly.

Appellant's Brief, pp. 67, 95.

It was as the immediate successor to the administration which proclaimed such doctrines that President Taft became chief executive, and under him the

withdrawal of September 27, 1909, was attempted to be made. President Taft himself says:

> "When President Roosevelt became fully advised of the necessity for the change in our disposition of public lands, especially those containing coal, oil, gas, phosphates, or water power sites, he began the exercise of the power of withdrawal by executive order, of lands subject by law to homestead and the other methods of entering for *agricultural lands*. The precedent he set in this matter was followed by the present administration."
>
> Message, December 6, 1910, p. 92.

The withdrawal of September 27, 1909, made under the authority of President Taft, was a withdrawal from all entry under either mineral or nonmineral laws, and it seems that, after it was made, President Taft himself began to appreciate that such withdrawals of public lands from the operation of existing laws involved, perhaps, an assumption of executive power which was unauthorized, and on January 14, 1910, he sent a special message to Congress, which included the following paragraph:

> "The power of the Secretary of Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statute would be detrimental to the public interests, *is not clear or satisfactory*. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the

Executive by laws adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals which have been made by the Secretary of the Interior and the President, and *to authorize* the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations *as to legislation* to meet the conditions of emergencies as they arise."

President's Special Message of January 14, 1910, p. 4.

We here see that President Taft was in doubt as to his authority to make the withdrawal of the previous September. His special message was sent to Congress for the purpose of inducing statutory action which would affirm and validate the withdrawals previously made, including that of September 27, 1909. As a result of this message we have the act of June 25, 1910, which act, however, as will appear upon examination of the same, and as will be developed later in this argument, did not affirm or confirm the action of the Executive as to past withdrawals, but did make provisions as to certain future withdrawals, but subject to the condition that nothing in the act contained should be deemed an *abridgment* of any rights, arising *after* such previous withdrawals made prior to the passage of that act itself.

These various quotations show the attitude of the executive branch of the government on the subject, and from them it is manifest that, in the opinion of some of our greatest Secretaries of the Interior, and of President Taft, who is one of our great lawyers, the lawful exercise of such executive power required the support of antecedent legislation by Congress.

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3. *Judicial Decisions Are Adverse to the Independent Executive Power, Asserted by Appellant.*

When we come to consider the authoritative decisions of the courts upon the subjects, it becomes very clear that the Executive does not possess the power to withdraw public lands from the operative effect of existing laws, without the authority of some law of Congress which, by direct expression or by necessary implication, shall give such power of withdrawal.

The principal line of decisions upon this subject grows out of the various land grants made by Congress to railroad companies or to states for specific purposes, and where, in order to protect the grant, it was necessary, to some extent at least, to withdraw from public entry lands which were or might become the subjects of the grant.

It was at one time held that, where a grant was made to a railroad company of the odd-numbered sections for a certain distance on each side of the line of final location of the road, and within an additional distance from the line of the road there should be a grant of indemnity lands to make up for losses within the limits first specified, a withdrawal could be made

by the Secretary of the Interior, not only of the lands within the original granted limits, but also the lieu lands within the indemnity limits outside of the original place limits of the grant, until the opportunity should be had for selection by the grantee. These authorities are, in effect, overruled by subsequent decisions.

It is very manifest that, if the Secretary of the Interior under his general powers has the right to withdraw public lands from the operation of existing laws, and to do so at his discretion, then there could be no legal objection to the withdrawal of such indemnity lands; and especially as the withdrawal would, in its nature, be temporary, for it would terminate after the selection by the railroad company of the lieu lands to which it was entitled.

But this court has clearly held in divers cases that under these various land-grant acts the President or Secretary had no power to withdraw the indemnity lands pending the time when the statutory grantee should make selection.

In the case of *Hewitt vs. Schultz*, 180 U. S., 139, this court approved the action of Secretary Vilas in annulling an order of withdrawal as to lands within the indemnity limits on the grant made to the Northern Pacific Railroad Company. And this decision is followed by various decisions of the Supreme Court, expressing with more and more emphasis the fact that such withdrawal of indemnity lands was not authorized by law.

Thus this court says:

> "But the real question is not whether the indemnity lands lay within or beyond the

forty-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the forty-mile limit, which is not a limit of withdrawal but of survey, and the whole argument in *Hewitt vs. Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity as well as place lands from settlement. * * * The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant."

Southern Pacific R. R. Co. vs. Bell, 183 U. S., 675, 685-686.

If the President or the Secretary of the Interior can at his own discretion, and without specific statute authorizing the same, but under the general authority of the President or the Secretary, withdraw public lands from the operation of existing laws, then it is manifestly immaterial as to the moving cause which induces action by the executive officer.

In a recent case this court thus speaks of the authority of the Secretary:

"We cannot give to the withdrawal from sale, pre-emption or settlement of the lands

upon which Ard entered in 1866 the legal effect which the plaintiffs in error insist must be given to it. It is conceded that the lands were not within the place or granted limits of either railroad, but were within indemnity lands. * * * The withdrawal of them from sale, or settlement, simply at the request of Senators and Representatives from Kansas, prior to the definite location of the road and before they were regularly selected to supply deficiencies in place or granted limits, was without authority of law. Such unauthorized withdrawal did not stand in the way of Ard, in virtue of his settlement on them in 1866 under the then existing homestead laws, from acquiring such an interest in the lands as would be protected against their subsequent selection by the railroad company."

Brandon vs. Ard, 211 U. S., 11, 21.

The last case cited is particularly pertinent in its application to the case under consideration. Congress, by its act of March 3, 1863, had granted to Kansas certain lands. A few days after the act was passed an order of withdrawal was approved by the Secretary of the Interior, and was received at the local land office May 5, 1863. This withdrew all the lands within certain limits, including that afterwards located by Ard. In June, 1866, Ard made an attempted settlement on the land under the homestead laws; made substantial improvements, and in July, 1866, made a homestead application, which was rejected by reason of the withdrawal. The map of definite location was

filed December 6, 1866. On July 1, 1867, Ard, having still been in possession of the property and making improvements, made a further application for his homestead entry, and this was denied. In 1872 he made another application, and this was denied. Ard remained continuously, however, in possession. So we have here a case where the right of the private citizen was initiated *after* the order of withdrawal was made by the Secretary of the Interior. The order of withdrawal was held to be beyond the power of the Secretary, and, therefore, void, and Ard's rights, so initiated after withdrawal and before selection of lands under the congressional grant, were sustained.

In a case not involving indemnity lands, this court thus announces the general rule:

> "Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by *Congressional authority* or by an executive withdrawal *under such authority*, either expressed or implied. *Wolsey v. Chapman*, 101 U. S. 755, 769; *Hewitt v. Schultz*, 180 U. S. 139. We must, therefore, refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual

limits of a grant by the Spanish or Mexican authorities before the cession of the territory by Mexico to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848."

Lockhart vs. Johnson, 181 U. S., 516, 520.

An interesting case bearing upon the powers of the Secretary as to the changing or suspending the operation of laws was determined by the Circuit Court of Appeals for the Eighth Circuit in a matter relating to allotment of lands to the Indians. The discussion is important in showing the powers of the Secretary. We quote as follows:

"Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252): 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects * * * Third—The Indians.'

Section 463, Revised Statutes (U. S. Comp. St. 1901, p. 262): 'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'

None of these provisions conferred the power claimed. It is not necessary to consider whether the provisions in the general allotment law quoted control allotments under the act of April 28, 1904. It is true, if this law applies, allotments must be 'made under

such rules and regulations as the Secretary of the Interior may from time to time prescribe.'

The power of Congress over the whole subject of our relations to the Indians is plenary. [Citing cases.] But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law but nullify its provisions. In *Williamson v. United States*, 207 U. S. 462, the Supreme Court said:

'True it is that in the concluding portion of section 3 of the timber and stone act * * * it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office;" but this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations *destructive of rights which Congress had conferred.*'

Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that

seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations.

The power to withdraw the land in question cannot be found in the provision that allotments should be certified to the Secretary of the Interior for his action, in the one providing for his approval of allotments before patent, in section 441, R. S., charging the Secretary of the Interior with supervision of the public business relating to the Indians, or in section 463, R. S., charging the Commissioner of Indian Affairs under the Secretary of the Interior with the management of Indian affairs and matters arising out of Indian relations. If under any of these laws the Secretary of the Interior could withdraw lands from allotment, or upon his judgment that lands authorized to be alloted by Congress ought not to be alloted refuse to approve an allotment when submitted for action, the very statute under which this action was brought, and which was enacted after all the statutes relied on were passed, would be practically nullified."

Leecy vs. United States, 190 Fed., 289, 292-293; 111 C. C. A., 254.

In the case of *Nelson vs. Northern Pacific R. R. Co.*, a map of general route of the Northern Pacific Company having been filed, a withdrawal from sale or entry was made of all the odd-numbered sections falling within the limits designated by the map, and the order required that the price of the even sections in the same territory should be increased to $2.50 per acre. This withdrawal order was made on November 1, 1873. Nelson's occupancy of the ground then in controversy commenced in the year 1881. He continuously resided upon the property, and made application for entry so soon as survey was made. The map of definite location of the company's line was not made until December 6, 1884. The withdrawal of 1873 was held invalid. This court said:

> "The withdrawal merely from sale or entry in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and *did not* and *could not affect any rights given to homestead occupants* by Congress in the acts of 1864 and 1880."
>
> Nelson vs. Northern Pacific R. R. Co., 188 U. S., 108, 133.

In the case of *Sjoli vs. Dreschel*, this court, citing many authorities in a note, held:

> "That the Secretary of the Interior has no authority to withdraw from sale or settle-

ment lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

Sjoli vs. Dreschel, 199 U. S., 564, 566.

In the case of *Osborn vs. Froyseth*, a railroad company was the beneficiary under the act of July 4, 1866. On July 12, 1866, and again by a modified order of April 22, 1868, an order was made withdrawing from settlement, for the benefit of the grant, the lands included within the indemnity limits of the line of railroad as located. In May, 1883, the railroad company attempted to select the land in controversy, together with other lands within the indemnity limits. Its selection was not approved, because not made in accordance with the rules of the department. There was no final approval of the selection until 1901. In the meantime, on May 15, 1889, a settlement was made by the homesteader upon the land, for which he afterwards attempted to make entry, and entry was refused on the ground that the land had been withdrawn by the executive withdrawal of April 22, 1868. The court says:

"A rejection upon the ground stated was not authorized, for the Secretary of the Interior *had no authority to withdraw* from settlement lands within the indemnity limits of the grant which had not been before selected and approved by him."

Osborn vs. Froyseth, 216 U. S., 571, 574.

In another case, decided by the Circuit Court of Appeals for the Eighth Circuit, the court, speaking, through Judge Sanborn, of a withdrawal by the Secretary and of subsequent suspension of such withdrawal, said:

> "But the Secretary's original withdrawal and his subsequent suspension were alike futile. He was *without lawful authority* to make either, and the lands always remained open to entry and sale under the timber and stone act, the homestead, the pre-emption, and the other general laws for the disposition of the public lands until each particular tract was either sold thereunder or the Secretary approved its selection by the railway company."

Hoyt vs. Weyerhaeuser, 161 Fed. Rep., 324, 328; 88 C. C. A., 404.

The case last above cited was reversed by this court, but the reversal was not based on any objection to the legal proposition above quoted, but was based entirely upon the question as to whether the rights held under the railroad company would accrue only upon the *approval* by the Secretary of the Interior of the selections made by the railroad company, or would, by relation, take effect as of the date of *filing* the selections. It was held by the majority of the court that the doctrine of relation applied in that case, and that the rights of the claimant under the railway company would date as of the *filing* of the lists which were subsequently approved, and that, as the rights of the other party originated between the dates of filing and of ap-

proval of the lists of selections, the case was improperly decided by the Court of Appeals.

Weyerhaeuser vs. Hoyt, 219 U. S., 380, 386, 388.

It will be observed that in certain of the cases which we have already cited attention is called to a provision in certain of the railroad grants referred to —as, for example, in the Northern Pacific grant— that the pre-emption and homestead acts—

> "shall be and the same are hereby extended to all other lands on the line of said road as surveyed excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than $2.50 per acre when offered for sale."

In none of the cases cited is the conclusion of the court as to invalidity of the withdrawal based solely upon this provision of the statute. It is, in some instances, used as a cumulative argument. But the main reliance in the discussion is upon the proposition that no special authority had been given to make the withdrawal, as expressed in a passage already quoted from Secretary Lamar (*supra*, p. 42):

> "Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands."

That this court does not rely in these decisions upon any prohibitory effect contained in the words of the statute above quoted is manifest from various of the decisions above cited.

In the case of *Lockhart vs. Johnson, supra,* in which the court so strongly stated the proposition that lands are to be regarded legally open for entry and sale under the land laws, "unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal *under such authority,* either expressed or implied," the statutes under consideration did not involve a land grant, and were not affected by any such words as are above quoted from granting statutes.

In the case of *Southern Pacific Company vs. Bell, supra,* the language quoted from the act is not cited or relied upon, and yet the court, speaking of the power of the Secretary to withdraw lands, says:

> "Clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of a grant."

And in the case of *Brandon vs. Ard,* above cited, no argument is based upon such statutory words.

It seems to us apparent that the real object of these provisions in the railroad granting acts was simply to provide for the increased price per acre for agricultural lands within the railroad granted limits which should be thereafter taken under the pre-emption or homestead acts, and the provision is made in different ways in different statutes. For example, taking the case of *Brandon vs. Ard, supra,* the rights turned upon the act of March 3, 1863, making a grant

of lands to the State of Kansas to aid in the construction of certain railroads. Instead of using language "extending" the pre-emption and homestead laws to the land not granted, the statute simply provided:

> "That the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold; * * * Provided, that actual and bona fide settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same, at the increased minimum price aforesaid. And provided, also, that settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each."
>
> 12 Stat. L., 773.

It is clear that the purpose of these provisions was to double the minimum price of land under the pre-emption laws, and to give only one-half the amount of land which would otherwise go under the homestead laws, within the railroad grant limits; and, in any event, the decisions of the Supreme Court, as above urged, are broad enough to sustain our conten-

tion in full, notwithstanding any such words in the railroad granting acts. But how can the appellant find any comfort in these provisions when in the present case it seeks to avoid the equally clear provisions of existing laws *declaring all of the mineral domain open to exploration and purchase?*

The authorities we have cited in this discussion express the latest views of this court upon the question. And upon the general proposition as to whether, independent of any congressional authority, the President has any inherent or implied power to withdraw public lands from the operation of existing laws, the argument seems conclusive against the power, subject to such particular exceptions, if any, as are controlled by special principles applicable thereto.

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4. *The Des Moines River Cases Do Not Militate Against the Contention of Appellees.*

Against the definite and well-considered decisions of this court above cited, the appellant cites a series of cases, known as the Des Moines River cases, all of which grow out of the same grant, the same withdrawal, and the same general state of facts, and which were decided many years ago.

When properly considered, the Des Moines River cases are not in conflict with the principles more recently laid down by this court in the authorities already cited. The facts out of which those cases grew are set forth at length in the earlier of the decisions, to-wit, *Dubuque & Pacific R. Co. vs. Litchfield*, 23 Howard, 66, and *Wolcott vs. Des Moines Co.*, 5 Wall., 681. The primary question was as to whether the

grant made to the State of Iowa by the act of August 8, 1846, of certain lands along the Des Moines River attached to lands above the mouth of Racoon Fork. If the terms of the grant did attach to these lands above the mouth of that fork, then such lands were necessarily withdrawn from private entry.

In the case of *Wolcott vs. Des Moines Co.*, in the passage quoted by the appellant (Appellant's Brief, p. 38), the court says:

> "The grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. * * * That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."
>
> Wolcott vs. Des Moines Co., 5 Wall., 681, 688-689.

As suggested in the quotation last made, there had been a great difference of opinion in the construction of this grant as to the extent of lands covered thereby. Justice Miller remarks in another case concerning it that—

> "This question was the subject of opposing decisions by at least three Secretaries and

> as many Attorneys General, and occupied several years of negotiation between the State and the Department. At one period of the controversy the lands were all certified to the State by the Secretary, Mr. Stuart."
>
> Williams vs. Baker, 17 Wall., 144, 147.

The grant was made for the purpose of aiding the Territory of Iowa to improve the navigation of the Des Moines River from its mouth to Racoon Creek, and granting alternate sections of the public land for a strip five miles in width on each side of the river, with provision for selection subject to the approval of the Secretary of the Treasury (this was before the creation of the Department of the Interior). Whatever withdrawal was made, was made under the authority of the granting act and to preserve the grant, and not under any general power of the Secretary to withdraw lands at discretion. And in one of these cases the court directly says:

> "The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or *authorized act* of the Executive Department of the government."
>
> Wolsey vs. Chapman, 101 U. S., 755, 769.

In the quotation made by appellant from the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 688 (Appellant's Brief, p. 38), there are, indeed, words (italicized by appellant) which express an opinion in support of a broad executive authority, but they are not made in that case to control the decision. If these

words stood alone and unaffected by subsequent decisions of a contrary effect, they would have weight; but the court, as if in doubt as to the first proposition made, as to the power of the Secretaries, proceeds to derive a special power from the grant of 1846, and the necessary implications from that grant. And it is upon such necessary implications, or upon direct authority, that we find this power in the Secretary confirmed in any subsequent case.

In these Des Moines River cases the question as to the effect of the act granting lands for the improvement of the Des Moines River, and the effect of the reservation of lands to satisfy the grant, sometimes arose in determining the rights of private entrymen under the Pre-emption Act, and sometimes from rights claimed by the grantees of a railroad company under a subsequent granting act. And there were necessarily involved to some extent in the discussion certain expressions contained in these other acts.

The Pre-emption Act of September 4, 1841, provided:

> "No lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes * * * shall be liable to entry under and by virtue of the provisions of this act."
>
> 5 U. S. Stat., 456.

The act of May 15, 1856, made a grant of lands to the State of Iowa of alternate sections to aid in

the construction of certain railroads in said state, but with a proviso as follows:

> "That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or for any other purposes whatsoever, be and the same are hereby reserved to the United States from the operation of this act * * * ."

11 U. S. Stat., 10.

The grant which was the occasion of the great differences of opinion which arose among executive officers was dated August 8, 1846, and was entitled, "An Act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines River in said territory," and it granted to the Territory of Iowa, "for the purpose of aiding said territory to improve the navigation of the Des Moines River from its mouth to Racoon Fork (so-called) in said territory, one equal moiety in alternate sections of the public land (remaining unsold and not otherwise disposed of, unincumbered or appropriated) on a strip five miles in width on each side of said river."

9 U. S. Stat., 77.

The first Secretary who had occasion to consider the scope of the grant of 1846 was Mr. Walker, then Secretary of the Treasury, who expressed an opinion that the "grant extends on both sides of the river from

its source to its mouth, but not into lands on the river in the State of Missouri."

This court says concerning the view of Secretary Walker:

> "This opinion conceded that 900,000 acres *above* the Racoon Fork was within the grant."
>
> 23 How., 85.

It was under this construction of the scope of the grant that the reservation for satisfaction of the grant was made, and such reservation was made directly pursuant to act of Congress; for, as we have already quoted from the case of *Wolcott vs. Des Moines Co.*, the court says that this grant carried along with it, by necessary implication, not only the power "but *the duty* of the land office to reserve from sale the lands embraced in the grant." It is a well-settled doctrine that if lands are once reserved from the public domain *by proper authority*, then the reservation continues in full force and effect until revoked by act of Congress, or by the executive authority that made the original reservation. Therefore, when the question arose in these various cases as to whether this reservation had been made by "competent authority," there was really but one answer to make. It was by authority necessarily implied from an act of Congress, as that act was construed by the officer whose duty it was to first construe it.

In one of these Des Moines River cases the statement of the case, after speaking of certain adjustments that were made, says:

"Soon after this adjustment, that is to say, in the spring of 1867, this court, in the case of *Wolcott v. Des Moines Company*, decided that the lands which had been reserved by the action of *so many principal officers of the United States*, including Mr. Stuart, Secretary of the Interior, had been reserved by 'competent authority,' within the meaning of the proviso of the act of May 15th, 1856, and decided again the same thing in *Des Moines Navigation Company v. Burr*, and yet again in *Harriet Riley v. W. B. Wells.*"

Homestead Co. vs. Valley R. R., 17 Wall., 153, 159-160.

The appellant especially urges the case of *Bullard vs. Des Moines R. R.* (122 U. S., 167), as sustaining an executive power to withdraw public lands "in aid of proposed legislation."

The words "in aid of proposed legislation" do not appear in the decision, and we submit that there is nothing whatever in that case to support *such* "aid of proposed legislation" as is contemplated by the withdrawal order of September 27, 1909, involved in the case at bar. Let us, at the expense of some repetition, briefly review, chronologically, the history involved in the *Bullard* case:

August 8, 1846: Congress granted to the State of Iowa certain lands on each side of the Des Moines River. (9 U. S. Stat., 77.)

March 2, 1849: Secretary of the Treasury Walker construed the granting act as including lands above

the mouth of Racoon Fork to the source of the river. (23 How., 85.)

Under this construction, the act of Congress itself reserved the lands from private entry, and it was the *duty* of the Land Office to withdraw them from sale. (5 Wall., 688-689.) Some lands above the mouth of the fork were actually certified to the state, and by it sold to purchasers.

April 6, 1850: Secretary of the Interior Ewing ordered all the lands then in controversy withdrawn from market, "which order has been continued ever since, in order to give the state the opportunity of petitioning for an extension of the grant by Congress. This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or pre-emption all the lands in controversy." (122 U. S., 170-171.)

In 1860 this court decided (23 How., 66) that the grant did not include lands above the mouth of the fork. Efforts were at once initiated in Congress to extend the grant so as to cover the lands so excluded by this court. In the meantime "the Des Moines Navigation Company, under contract with the state, had spent large sums of money beyond what they had received from the state, and beyond the value of the lands certified to the state by the Secretary. The work, with all the materials and implements on hand, was suspended, and the danger of the works being swept away and ruined by floods in the river was imminent. *The whole subject was before Congress*, but, without waiting to dispose of it entirely, that body, by way of immediate relief," passed the joint resolution hereinafter mentioned. (122 U. S., 171.)

May 18, 1860: The Commissioner of the General Land Office gave *notice* that the lands theretofore reserved would continue reserved, "to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles *from the state*, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper." (122 U. S., 173.)

March 2, 1861: The joint resolution of Congress above referred to was passed, relinquishing to the State of Iowa land theretofore improperly certified to the state "which is now held by *bona fide* purchasers under the State of Iowa." (122 U. S., 172.)

May 2, 1862: Two of the settlements on which Bullard's claim was based were initiated on lands included in the reservation. Bullard's title was not based upon any right in the State of Iowa, but was in opposition to that right. (122 U. S., 174, 175-176.)

July 6, 1862: Congress, by statute, extended the grant made to the State of Iowa so as to include the lands to the north boundary of the state, including all the lands which Secretary Walker in 1849 held to be covered by the original grant.

The remaining settlement claimed by Bullard was made after the last granting act of July 6, 1862.

There was no contention in the Bullard case that the original reservation and continuance of the same were not valid. The question raised, and the one decided by the court, was simply whether the joint resolution of March 2, 1861, *restored* the reserved lands to the public domain. That resolution did not purport to restore any lands to the public domain, and,

as this court says, dealt only with a part of the subject. The principle applies to this case, as in the other cases of the same series, that the granting act, as originally construed by the Secretary who had first to construe it, necessitated a withdrawal of all these lands. They were withdrawn, and that withdrawal would be effective until revoked, as above suggested, by act of Congress, or by the executive. Instead of revoking it, the reservation from the public domain was made absolute by the act of Congress of July 12, 1862, which granted all the lands in controversy to the state.

Under the circumstances affecting these Des Moines River cases, as hereinabove set forth, we respectfully insist that these cases do not in any degree militate against the proposition we are urging, to the effect that the President or Secretary of the Interior has no inherent or implied power to reserve from the operation of existing laws large tracts of the public domain, when there is no statute which either expressly or by implication gives him that power.

In all of the decisions of this court bearing upon this subject, where the power of the President or Secretary to make a general withdrawal of lands was sustained, it will be found that there was some statute which either expressly, or by necessary implication, authorized and required a withdrawal in order to protect the grant that was made, or to accomplish the specific purpose contemplated by the statute.

We readily concede the principle that where a grant of lands is made by Congress it is the duty of the land department to withdraw the lands granted from the operation of the general land laws, as this

would be necessary to preserve the rights that Congress intended to convey. Even the earlier decisions which sustained a power in the Secretary to withdraw indemnity lands prior to selection rested on the doctrine that the granting acts implied this power as necessary to carry out the will of Congress as expressed in the statutory grant. It was but another way of saying that the executive duty "to take care that the laws be faithfully executed" required such withdrawal in order to effectuate the congressional grant. But this court now clearly holds that this power of withdrawal is always limited to what was intended by Congress as the scope of the immediate grant. This is shown very clearly in that line of decisions we have already cited, which, while holding that it is within the power of the Secretary of the Interior, and is his duty, to withdraw lands in the place limits of railroad grants from any entry or sale under the public-land laws, yet further declare that when the Secretaries go outside of those limits and withdraw lands to which the grant had not yet applied, such withdrawal is beyond the power of the Secretaries, because it is beyond the scope of the granting act. This principle runs through all of the recent decisions of this court. Nowhere do we find recognized an "inherent power" on the part of the President or Secretary to withdraw lands at his discretion or in accordance with his will.

Our answer, therefore, to the question propounded at the head of this division of our argument would be: That the source and sanction for any authority of the President or Secretary of the Interior to withdraw public lands from *non-mineral* entry under existing

laws must be found in congressional legislation, and the extent to which the executive authority is granted must be measured by the words of the congressional enactment.

V.

Under what sanction and to what extent has the President the power to reserve public lands for public uses?

The appellant presents the contention that the authority of the President to make the withdrawal of lands now under consideration is sustained by the fact that he has the power to make reservations for military purposes and for Indian reservations.

It will be borne in mind that Temporary Petroleum Withdrawal No. 5 does not purport to make any reservation or appropriation for any purpose whatsoever. It is simply a withdrawal of all the mineral-oil domain from the operation of existing laws, with a view to a change of those laws.

Even if it be true that the President has power, not founded on statute, to actually appropriate and take possession of particular tracts of land for specific public uses, this surely is no argument in support of a power to withdraw from the operation of existing laws the entire mineral-oil domain by an order which makes no appropriation for any purpose, takes no possession of any land, and devotes no land to a public use.

We shall, however, proceed to consider this contention of the appellant, and ascertain the source and the extent of the alleged power of the President even in these particulars, although to us they do not seem

relevant to the present controversy. We shall find that these powers alleged to exist in the President were originally, and have been generally, derived from action of Congress; and that their later exercise without specific act of Congress to authorize the same has been based on an assumed grant by Congress, pursuant to a general policy manifested by numerous acts giving discretion to the President in cases of like character.

An early and an interesting case bearing upon the subject was decided in this court as long ago as 1839. In the case of *Wilcox vs. Jackson* (13 Pet., 496) this court reversed a decision of the Supreme Court of Illinois, but in order that we may properly understand the principles involved, so far as they affect the question now in controversy, it is well for us to know what was decided by the Supreme Court of Illinois.

In the case of *McConnell vs. Wilcox* (1 Scam., 344), the court had said:

> "We take it for granted that there can be neither a reservation nor appropriation of the public domain for any purpose whatever without the express authority of the law. It can not, surely, be seriously contended that the President of the United States, or any of the executive officers in the several departments of the government, possess an absolute and inherent power to do any official act not authorized by the Constitution or laws of the United States. To the Constitution and laws they must alone look for the source of their power and authority because they can derive them from no other. The government itself is

a limited one, and the great charter under which it exists, has prescribed bounds which can not be rightfully transcended; and all its functionaries are necessarily restrained by its provisions and the laws made in pursuance thereof from the exercise of an authority not granted thereby. If it be considered that the President may reserve or appropriate the public domain to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects? The one may be as laudable as the other, but both would be equally unauthorized and illegal. To admit for a moment that the President, without the authority of law, may direct the application of the public moneys of the nation, to even such objects as may undeniably be salutary and highly useful, would be to admit the exercise of a power in direct violation of the Constitution; and yet the exercise of a power appropriating and applying the public lands to purposes not authorized by law, but in direct violation of the express condition on which they were ceded, and the purposes to which they were solemnly stipulated to be applied, it is contended, is an implied power, rightfully exercised by an inferior officer of the government without the assent of the executive of the nation. This position is most assuredly untenable. Neither the officer, acting in his own name or that of the Presi-

dent, nor the President himself, possess any such authority" (p. 354).

Now, while the decision in this case was reversed by this court, yet there was no criticism upon or dissent from the principles so clearly announced in the opinion of the state court. The difference arose in the construction of the statutes under which the President had acted. This court, after referring to the act of May 29, 1830, under which McConnell was claiming, which provided "that no entry or sale of any land shall be made under the provisions of the act, which shall have been reserved for the use of the United States, or either of the several states, or which is reserved from sale by act of Congress, or *by order of the President*, or which *may have been appropriated for any purpose whatsoever*," then goes on to say:

> "Now, that the land in question has been appropriated, in point of fact, there can be no doubt, for the case agreed states that it has been used from the year 1804, until and after the institution of this suit, as well for the purpose of a military post, as for that of an Indian agency, with some occasional interruption. Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use. But it is said that this appropriation must be made by authority of law. *We think that the appropriation in this case, was made by authority of law.* As far back as the year 1798, see act of May 3d of that year (1 U. S. Stat. 554), an appropriation was made for the purpose,

amongst other things, of enabling the president of the United States to erect fortifications in such place or places as the public safety should, in his opinion require. By the act of 21st of April, 1806 (2 Ibid. 402), the president was authorized to establish trading houses at such posts and places, on the frontiers, or in the Indian country, on either or both sides of the Mississippi river, as he should judge most convenient for carrying on trade with the Indians. And by act of June 14th, 1809, he was authorized to erect such fortifications as might, in his opinion, be necessary for the protection of the northern and western frontiers. We thus see, that the establishing trading houses with the Indian tribes, and the erection of fortifiactions in the west, are *purposes authorized by law;* and that they were to be established and erected by the president. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if congress had by law directed the trading house to be established and the military post erected, at Fort Dearborn, by name; that this would have been by authority of law. But instead of designating the place themselves, they left it to the discretion of the president, which is precisely the same thing in effect. *Here then is an appropriation, not only for one but for two purposes, of the same place, by authority of law.*

> But there has been a third appropriation in this case, *by authority of law*. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated $5,000 for its erection; and the case agreed states, that the lighthouse was built on part of the land in dispute, before the 1st of May, 1834. We think, then, that there has been an appropriation, not only in fact *but in law*."
>
> Wilcox vs. Jackson, 13 Pet., 496, 511-512.

This case involved an actual appropriation of lands for military purposes, and yet even in such a case this court does not suggest or countenance any power in the President, independent of statute, to make such appropriation, but takes special pains to show that his power rested on antecedent legislation. Congress, exercising its constitutional power, has, in numerous cases, conferred upon the President *discretion* in the matter of selection or appropriation of public lands for public uses. It has by statute in recent years on several occasions given a discretionary power to the President to make extensive reservations of lands, withdrawing them from the right of private entry. *After* the passage of such statutes, and within their intended scope, the power *is* conferred upon the President, and he legitimately exercises that discretion which has been given him by *Congress*, which has the exclusive control of the public lands.

The case principally relied upon by appellant, and frequently cited by those who support the authority

of the President to make appropriations of public lands for public uses without antecedent authority from Congress, is the case of *Grisar vs. McDowell* (6 Wall., 363), decided by this court in 1867. In that case the court says:

> "From an early period in the history of the government it has been the *practice* of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for *public uses.*"

The decision itself is not a very satisfactory authority, for the simple reason that the remarks made in the opinion upon this matter were not necessary to the decision of the case then before the court. They are *obiter*, for in the first part of the very paragraph in which we find the above quotation the court says:

> "On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, *it is of no consequence to the plaintiff* whether or not the President possessed *sufficient authority to make* the reservations in question. It is enough that the title had not passed to the plaintiff, but remained in the United States" (p. 380).

After making the statement first above quoted, and elaborating it by reference to certain statutes hereinafter noted, the court says:

> "The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them" (p. 381).

If, however, the above dictum should be accepted as declaring the law as applied to the facts of that case, it is to be noted that the opinion related to a military reservation at San Francisco which had been long occupied by the government for military purposes, and was, at the time the controversy arose, in the possession of the government and used for military purposes.

It is in such a connection that the opinion in that case recognizes the authority of the President, as the "exigencies of the public service" required, to reserve certain parcels of land belonging to the United States, and setting them apart for *public uses*. It may be fairly contended that exigencies might arise in the public service which would justify the President in setting apart specific small tracts of land for an immediate public use, but such reservations must be by reason of some exigency, be limited in extent, and specifically designated and "marked out."

U. S. vs. Tichenor, 12 Fed., 415, 423.

An examination of congressional legislation, however, shows (as will hereafter more fully appear) that Congress has pursued the practice of giving to the President in advance the necessary authority to so reserve land for public uses, although generally leav-

ing to his discretion the place where such reservation shall be made, and often the extent of the reservation, although invariably defining the purposes.

The language quoted from *Grisar vs. McDowell,* has been made the basis of various decisions by courts and Attorneys General.

So, in a Florida case often cited on this subject, the language of the court is:

> "It is well settled that the President of the United States, by executive order, could reserve a part of the public domain for a *specific lawful purpose* such as a *military reservation.*"

That decision had reference to such an executive order made on February 9, 1842, directing a reservation for military purposes of two fractional sections and certain lots in another fractional section in Florida.

> Florida Town Imp. Co. vs. Bigalsky, 44 Fla., 771; 33 So. Rep., 450, 451.

In an opinion of Attorney General MacVeagh, rendered in 1881, the authority of the President to set apart a *military reservation* on the Rio de la Plata, in Colorado, was sustained on the authority of *Grisar vs. McDowell.* In the course of his argument he says:

> "It should be borne in mind that the power of the President here referred to is recognized by Congress. Such recognition is *equivalent to a grant.* Hence, in reserving and setting apart a particular piece of land

> for a *special public use*, the President must be regarded *as acting by authority of Congress.*"
>
> 17 Opinions of Attorneys General, 160, 163.

The very next year Attorney General Brewster had occasion to consider the presidential power to make Indian reservations, and the question which specially concerned him was whether the reservation for Indians was a reservation for a *public use.* In the course of his opinion, after citing certain authorities, he says:

> "In the cases cited the reservation had been for military purposes or for public improvements. Is a reservation for occupation by Indians a reservation for a public use?"

He then proceeds to argue that such a reservation is for a public use.

> 17 Opinions of Attorneys General, 258, 260.

The opinion of Assistant Attorney General (now Justice) Van Devanter, in reference to public lands in the Hawaiian Islands (29 L. D. 32), is based on the same principles and sustained by like authorities. He concludes that the President has power to reserve lands for *military* purposes, and urges that *"Congress* recognized that some lands in Hawaii would be reserved for *military and other public purposes.*" (P. 34.)

These views as to what constitutes public uses explain also decisions of certain courts in reference to

Indian reservations in cases which are also frequently cited in opposition to our contention.

See:

U. S. vs. Payne, 8 Fed. Rep., 883, 888.
Gibson vs. Anderson, 131 Fed. Rep., 39, 41.

In cases referring to Indian reservations it will usually be found that before the controversy arose in the courts there had, in addition to a previous statutory authority, been also a congressional recognition and appropriation in aid of the reservation. Thus, in the case last cited, it is said:

> "The power of the President to create a reservation of public lands for the use and benefit of the Indians and for other purposes has been recognized both by Congress and by the courts—by Congress in enacting subsequent appropriation acts, appropriating money therefor, or other acts, as *in this particular case* by the act of May 27, 1902, and by the joint resolution No. 24 (32 Stat. pt. 1, 245-277), and joint resolutions Nos. 25 and 31 (32 Stat. pt. 1, 742, 744)."
>
> 131 Fed., p. 41.

We readily concede that if a withdrawal of specific lands was made by the President without previous authority of Congress—as, for example, for an Indian reservation, or for any other public purpose—and, *before any adverse rights arose*, there was a recognition of the withdrawal by Congress, appropriations made in aid of it, or other affirmative act to show that Congress understood and recognized the

propriety of the withdrawal, then from the date of such recognition and approval the withdrawal would be effective as against any private rights claimed to subsequently accrue. But the question becomes one of legal cognizance for the consideration of courts when private rights have accrued and become vested between the time of the withdrawal and the time of the recognition or approval by Congress. And the fact that such withdrawals, made without precedent authority, have passed unchallenged is, we respectfully submit, no argument for an executive power to make such withdrawals, and make them effective to defeat rights that shall arise under existing statutes prior to congressional approval of the withdrawal. We again call attention to the case of *Nelson vs. Northern Pacific Railroad Co.*, 188 U. S., 108, 133 (*supra*, p. 56), where the court, speaking of the withdrawal there referred to, said that it "was made only out of abundant caution and in accordance with a practice in the land department, *and did not and could not affect* any rights given to homestead occupants by congress in the Acts of 1864 and 1880."

Public uses of the United States, as used in *Grisar vs. McDowell* and the other decisions cited, must, however, refer to governmental use—a use rendered necessary for the proper discharge of the functions committed to the executive branch of the government in its various departments. It certainly does not apply to any broad exercise of power, independent of an immediately intended governmental use. In this connection see the following citations:

Covington vs. Kentucky, 173 U. S., 231, 242.

Williams vs. Lash, 8 Gilfillan (Minn.), 496.
Orr vs. Quimby, 54 N. H., 590.

The appellant cites the case of *Scott vs. Carew.* (Appellant's Brief, p. 26.) The question in that case was whether Hackley could claim the benefit of the Settlement Act of 1826, and the court says:

> "Prior to that act he was wrongfully in possession of the tract, and could have been summarily removed by order of the President. (Act of March 3, 1807). His dispossession was by authority of law. It was done in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department being presumed to be that of the President."

Scott vs. Carew, 196 U. S., 100, 109.

Now, the act of March 3, 1807, here referred to, was an act to prevent settlement being made on lands ceded to the United States until authorized by law. And it contained this clause:

> "And it shall moreover be lawful for the President of the United States to direct the Marshal or officer acting as Marshal, in the manner hereinafter directed, and also to take such other measures and to employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession, as aforesaid, any person or persons who shall hereafter take possession of the same, or

make or attempt to make a settlement thereon until thereunto authorized by law."

2 U. S. Stat., 445.

The passage quoted by the appellant, therefore, had absolutely nothing to do with the validity of the reservation, as affecting subsequent rights acquired under the settlement laws. But this court does say that the occupation of the tract by the United States troops was rightful, and announces a rule as to the settler's rights, as follows:

> "A more substantial reason is to be found in the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some *special public purpose* have been *in accordance with law* taken full *possession* of by and are in the *actual occupation* of the government."

Scott vs. Carew, *supra*, 109.

The rule so announced is very far removed from that for which the appellant contends in this case, and cannot in the slightest degree sustain a withdrawal of the entire mineral-oil domain of the United States from the operation of existing laws.

Appellant's citations relating to Indian reservations are not persuasive as supporting an implied power in the President even to set apart such reservations independent of congressional authority.

In the case of *United States vs. Leathers* (6 Sawyer, 17) the court makes the argument which we have already suggested, derived from subsequent recognition by acts of Congress and by appropriation of moneys. It also relies on section 462 of the Revised Statutes, showing the powers of the Commissioner of Indian Affairs, and section 465, relating to the powers of the President as to Indian affairs, and on particular acts of Congress giving the President authority to set apart military reservations, and adds:

> "But were this not so, the repeated recognition by Congress of the reservations established in Nevada by the President would be enough, along with the general powers given the President in Indian affairs, to show his authority."
>
> 26 Federal Cases, 898, 899.

The case of *United States vs. Payne* (8 Fed. Rep., 883) involved the construction of treaties and the powers of the President under the act of Congress of May 28, 1830, hereinafter cited, and even in the quotation in that case made by the appellant the power attributed to the President is to "reserve a part of the public domain for a *specific lawful purpose.*"

In the case of *Gibson vs. Anderson* (131 Fed. Rep., 39), as already suggested, there had been subsequent recognition of the reservation by acts of Congress. In that case the Indian Reservation had been in existence for eleven years before Gibson attempted to initiate rights, and he did so then only in the erroneous belief that Congress had opened the reservation to mining locations.

In the case of *United States vs. Martin* (14 Fed. Rep., 817) again a treaty was involved, and, speaking of the treaty, the court says:

> "Nothing has since been done to modify it, or to limit its operation. The reservation has been exclusively occupied by the Indians, under the treaty, ever since they first went upon it, and Congress has continually recognized it by annual appropriations, in pursuance of the treaty stipulations, for its support and the maintenance of an agent for the Indians thereon" (p. 822).

In *McFadden vs. Mountain View M. & M. Co.* (97 Fed., 670) the court says that the effect of the executive order was the same as would have been a treaty with the Indians for the same purpose, and then proceeds to say that Congress had passed an act authorizing the President to appoint a commission to visit the reservation and negotiate with the Indians for the cession of portions thereof. An agreement was made and an act of Congress was passed to ratify the agreement, and the main question upon which the case turned was as to whether the act of Congress, by itself, restored a portion of the reservation to the mass of public lands, or whether a new proclamation of the President was necessary before that result would be accomplished.

In the case of *United States vs. Grand Rapids & I. R. Co.* (154 Fed. Rep., 131) there was involved the question of the right of a railroad company, under its grant, to lands which had been in an Indian reservation. The railroad grant contained the usual provision excepting—

> "any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purposes whatsoever."

A treaty was being negotiated with the Indians, and the court expressly states as follows:

> "The reservation of the lands in question by the President *for the purposes of the contemplated treaty* was by 'competent authority'" (p. 135).

In the case of *In re Wilson* (140 U. S., 575) the court was speaking of the White Mountain Indian Reservation, which it says was a legally constituted Indian reservation. It was created, in the first instance by order of the President in 1871, and this court uses the following language:

> "Whatever doubts there might have been, if any, as to the validity of such executive order, are put at rest by the act of Congress of February 8, 1887 * * * , the first clause of which is 'That in all cases where any tribe or band of Indians has been or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress *or executive order* setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part there-

of, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows.'"

The court then adds:

> "The necessary effect of this *legislative* recognition was to *confirm* the executive order, and establish beyond challenge the Indian title to this reservation" (pp. 576-577).

The case of *Spalding vs. Chandler* (160 U. S., 394) also involved a treaty, and the court says:

> "But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. The clear *duty* rested upon the government to see that a tract was reserved for the purposes designated in the treaty" (pp. 403-404).

We respectfully submit that none of these cases are valuable as authorities in support of the government in its contention in the present case. In all the

cases cited by appellant on this subject there have been actual, direct reservations and appropriations of specific lands for recognized and legitimate *public purposes*. Any withdrawal of such lands from the right of private entry was merely incident to such actual appropriation. When private rights were thereafter asserted as to such lands, they came into collision with an operating and existing public use. In the case of *Gibson vs. Anderson* (131 Fed., 39), for example, Gibson made his mining location on lands which for eleven years preceding had been within the Spokane Indian Reservation.

There is a vast difference, not only in degree, but in character, between a reservation and appropriation of specific lands for recognized public uses, and a withdrawal of the entire mineral-oil domain from the operation of existing laws, in the hope that those laws will be changed.

Even as to such appropriations or reservations of lands for public uses the action of the President has in general been based upon specific authority granted by Congress, although often in the form of vesting in the President a discretionary power to make his own selection of lands for the public uses designated. This is illustrated by citations already made from *Wilcox vs. Jackson*, *supra*.

An examination of the statutes of the United States shows numerous enactments by Congress giving either specific or discretionary power to the President for the making of such reservations and appropriations for public use. We append to this brief, as an appendix (*post*, p. 161), a partial list of statutes of this character. Their number is significant, and these

frequent enactments show the real policy which has actuated Congress in relation to the use of public lands for public purposes.

The appellant, however, makes an argument based upon an alleged long continuance of a *practice* of the executive department to make reservations of public lands for public uses, without the authority of a specific antecedent statute, and upon the alleged congressional recognition of executive acts of this character.

It may well be conceded that there have been instances of such executive appropriations of lands unauthorized by previous statute specifically covering the subject-matter, and it may well be conceded that Congress has often allowed such acts to pass unchallenged, and has in effect ratified the executive act by subsequent legislation in aid of the object. But this is no argument, as it seems to us, that can control the courts when adverse rights have arisen, and the validity of the proceeding, as affecting such adverse rights, is the subject of judicial inquiry. The mere acquiescence of Congress in an unauthorized act of the executive is no congressional authority for a continuance or repetition of unauthorized acts. Congress does not stand over the Executive as a schoolmaster with a rod to correct departures from an established rule. Generally speaking, the majority of Congress is politically in sympathy with the President, and there is no incentive or occasion for captious criticism where adverse rights are not affected; and, when adverse rights are affected, the question which arises is one for judicial and not legislative cognizance.

Counsel for appellant cite opinions of Attorneys General and of officers of the Interior Department in support of the executive power to reserve parcels of land for specific public purposes. The argument almost invariably finds its origin and main support in the case of *Grisar vs. McDowell* (6 Wall., 363), already discussed. In that case Mr. Justice Field said: "From an early period in the history of the government it has been the *practice* of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set aside for public uses." This court does not attempt to trace the origin of the "practice" or the sanction for it. It merely states the bald fact. But had Justice Field investigated the source and sanction for this "practice," he would have found them in the numerous statutes which we cite in the appendix to this brief, by which Congress had vested in the Executive a discretion to select, at such places as he should determine, and in such quantity as he should determine, particular parcels of land for specific public uses, when the exigencies of the public service so required. The practice referred to was simply the exercise of that discretionary power which had by these numerous statutes been vested in the Executive.

The opinions of Attorneys General are not conclusive upon anyone. They are advisory only, even as to heads of departments. (See *Dubuque & Pacific R. R. Co. vs. Litchfield*, 23 How., 85; see also *No. Pac. Ry. Co. vs. Miller*, 7 L. D., 100, 117.) We can well understand how officers connected with the executive branch of the government would naturally give opin-

ions sustaining the executive authority in cases coming within the language used by Justice Field in *Grisar vs. McDowell*, and yet we submit that the Attorneys General do not sustain the executive power in these cases upon any theory of "implied" power existing independent of congressional authority; but, rather, when the subject is interpreted in the light of the decision in *Grisar vs. McDowell*, they seem to assume that, discretion having so frequently by numerous statutes been vested in the executive to set apart parcels of land for specific public uses, it was to be inferred that this was a general policy of Congress, and that such discretion could be exercised *in any like case*, even though Congress had not enacted a specific statute covering the particular case.

This is illustrated by the opinion of Attorney General MacVeagh on July 15, 1881 (17 Opinions of Attorneys General, p. 163), cited by appellant, where the Attorney General says:

> "It should be borne in mind that the power of the President here referred to is recognized by Congress (*Grisar v. McDowell, supra*). Such recognition is equivalent to a grant, hence in reserving and setting apart a particular piece of land for a special public use the President must be regarded as acting *by authority of Congress.*"

This is an entirely different argument from that now presented by the appellant in this cause. The Attorney General finds the power of the executive to be a grant from Congress, and that, in making the reservations, he is acting by authority of Congress.

If this argument be sound, however, it is necessarily confined to the particular class of cases to which the argument is addressed, being the class of cases mentioned in *Grisar vs. McDowell*—cases where *parcels* of land are reserved and set apart for *public uses*, as the *exigencies* of the public service require. Whatever may be the merits of this argument on behalf of the executive power, it rests upon the assumption that *Congress* has in fact given the authority to the President to appropriate and use the public lands for military reservations and for Indian reservations, and, as the exigencies of the public service require, to take possession of and occupy parcels of land for specific public uses.

Appellant's counsel are not entirely happy in their selection of illustrations of executive acts (as unsupported by statute) setting apart land for public purposes, as cited at page 48 of their brief.

The first instance given is an order of President Buchanan, dated April 6, 1859, in reference to certain property to be used for military purposes in Utah. In the appendix to this brief (*post*, p. 166) we cite an act approved March 6, 1853 (10 Stat., 238), where the President was given discretion to set apart military reservations in Utah and New Mexico. The wide discretion given by this act would well have supported the act of the President only six years later in making the particular order to which counsel calls attention.

The order of President Johnson, made in 1867, for a reservation for military uses of a tract of land at Fort Wadsworth, in Dakota Territory, seems also to be sustained by precedent statute. Dakota Territory was formerly a part of Nebraska Territory. It

was a part of Nebraska in 1855, and authority was given by the act of February 17, 1855, for the *establishment* of military posts in the Territory of Nebraska at such points as the Secretary of War might designate. An authority having been given for the establishment for these posts, it became a continuing authority, because, once being established, they must be maintained. This statute we also cite in the appendix to this brief.

The reservation made for use of Fort Robinson in Nebraska, and Forts Sanders and D. A. Russell, etc., in Wyoming, would seem to be fully covered by the same statute; for at the time the act was passed all of these points were in the Territory of Nebraska, which extended west to the summit of the Rocky Mountains, and covered all the present territory of Wyoming east of the Rocky Mountains, as well as territory north thereof, and the later Dakotas.

Appellant next mentions an order of the Secretary of the Treasury, made at the request of the Secretary of *War*, on September 1, 1837, in reference to certain lands at Sturgeon Bay, Wisconsin. Now, on the eastern side of the present State of Wisconsin there is a long, narrow peninsula extending into Lake Michigan. The water between that peninsula and the mainland is known as Green Bay, which is at the mouth of Fox River and carries the water of that stream into the lake. On the east side of Green Bay, and on the west side of the narrow peninsula referred to, is Sturgeon Bay. All of this was formerly in the Territory of Michigan. (Act of April 18, 1818; 3 Stat., 431.) In 1834 certain land districts were created in that vicinity, and one of them

was known as "the Green Bay land district of the Territory of Michigan;" and in the act creating this land district provision was made for the sale of lands with certain exceptions, and included in such exceptions "such reservations *as the President shall deem necessary* to retain for military purposes, any law of Congress heretofore existing to the contrary notwithstanding." (Act of June 26, 1834; 4 Stat., 687.)

It is apparent that this reservation was for a stone quarry to be used in connection with certain public works then in progress, which public works must also have been authorized by law, and counsel put in quotation marks the words involved in the reservation; to-wit, "to be reserved from sale *according to law.*" These are not words that would be used as to a reservation not authorized by statute. The words "according to law" can only mean in accordance with some authority that had been given by Congress for the very thing that was then being done. Such words are not used as based upon an *implied* authority in the President or other executive officer.

The reservation made by President Hayes for reservoir purposes was in a matter initiated by Congress and not by the Executive, and was manifestly to protect a purpose contemplated by Congress, as shown by its *previous* appropriation for the necessary preliminary surveys and examination, and reports, which preliminary action was immediately followed by the actual construction of reservoirs upon the land mentioned.

In the vast multitude of authorizing acts vesting discretion in the President to reserve lands for specific public purposes it may not always be practicable to

trace, even though it actually exists, the preceding authority given by Congress. Such authorities were often contained in long appropriation acts, and while the appropriation might have been temporary, the authority given was to establish military posts or various reservations, or reserve lands for specified public uses; which authority was, in its nature, a continuing authority.

In the case *Donnelly vs. United States* (228 U. S., 243), this court had occasion quite recently to discuss one of the statutes cited in the appendix to this brief, being an act in relation to the Indians in California (13 Stat., 40), and the court, speaking through Mr. Justice Pitney, says:

> "The terms of this enactment show that Congress intended to confer a discretionary power, and from an early period *Congress has customarily accorded to the Executive* a large discretion about setting apart and reserving portions of the public domain in aid of *particular public purposes.*" (Citing authorities.)

The considerations here presented acquire increased significance when we consider the vast scope of these oil-land withdrawals. The appellant contends that the extent of area withdrawn is a matter which rests entirely with the President. But suppose, as in this case, that Congress has granted no power of withdrawal and, in the meanwhile, private rights have accrued under existing laws, is there no limit on action that is purely executive? Surely, in a country ruled by laws the answer is plain. Even if

it be admitted that, for some definite public use, recognized by law, the President has the power to reserve specific lands, it does not follow that he has the power to reserve *all* lands, including millions of acres of the same class, and involving vast areas manifestly not required for the public use designated. When the question is asked as to who shall decide such a question, we should say that when adverse rights have arisen it is clearly a question for the courts to decide, and it is not a matter which can be left to executive discretion.

The contention of appellant, relating to the scope of these oil withdrawals, may lead us into remarkable consequences. The contention is that the government *may* need (after a change of legislative policy) *some* land as a reserve for fuel oil for the navy. Therefore, the President may take out from the operation of existing laws *all* lands containing fuel oil. But the government is also a great user of gold. Gold is itself money; can be at once converted into coin, and, as coin, may be used to satisfy all the public needs. It has been and is the policy of many governments, for this reason, to hold title to lands containing the "royal metals" (gold and silver), and either operate the mines themselves or lease them upon royalties. That has not been the policy of the United States. But, under appellant's argument, does this fact stand in the way of executive action? The President thinks the law should be changed; that the policies pursued in foreign countries should also be pursued here; that the government should reserve its gold-producing lands for the benefit of the government, and especially for the production of such gold as it itself desires to

convert into coin. Therefore, the President, in the hope and expectation of a change of law, and of a change in the policy of a century past, withdraws from the public domain lands supposed to contain gold deposits. If he can withdraw some, under appellant's contention he can withdraw all, and thereupon, all lands bearing gold being withdrawn, the mining laws cease to be operative. Again, the government is also a great user of coal. It needs it now for its ships; it needs it for its arsenals; it needs it for manufacturing purposes in its mines; and in a thousand ways it is a great consumer of coal. These are now "lawful public uses," and although the policy of the government has always been to buy its coal in the market, yet the Executive may think the law should be changed, and he can therefore withdraw coal lands from the public domain for public use. And, according to appellant's contention, if he may withdraw some he may withdraw all; *ergo*, all of the coal deposits of the United States may be withdrawn from private entry under this executive power, notwithstanding existing laws providing for their private acquisition. The appellant's argument must to this complexion come at last.

Our answer to the inquiry at the head of this division of our argument would be:

(1) That the President's power to reserve public lands for public uses finds its sanction in acts of Congress;

(2) That even where no specific statute directly authorizes the executive act, it nevertheless derives its authority from an assumed grant by Congress, manifested by frequent enactments of statutes giving *like authority* in *like cases;* and

(3) That its extent is limited to the setting apart of particular tracts of land for specified public uses, as the exigencies of the public service may require.

VI.

Any executive duty to PROTECT the property of the United States will not warrant an order withdrawing the entire mineral-oil domain from the operation of laws which Congress has enacted, and which remain in full force.

Aside from appellant's contention that the withdrawal order of September 27, 1909, prevented the valid location of mining claims upon property included within the described areas covered by the withdrawal (which is the very question now in issue and under discussion), there is no allegation or suggestion in the bill, and there is no contention in the argument of the appellant, that the appellees, or their grantors, had in any way committed any trespass upon the public lands. It is not alleged, nor is it contended, that any fraud was practiced, or intended to be practiced, by appellees or their grantors. The acts of the locators of the mining claim in controversy were, unless prohibited by the withdrawal of September 27, 1909, clearly within rights granted to them by statutes of the United States.

But appellant's counsel try to find an argument in support of the withdrawal order of September 27, 1909, in an *implied* duty of the Executive to *protect* our shores from unauthorized use by or under a foreign power (Appellant's Brief, p. 77); to *protect*

our interstate commerce from unlawful obstruction (Appellant's Brief, p. 80); and to *protect* high officials of the government from unlawful and murderous assault when in the performance of their public duties (Appellant's Brief, pp. 81-89).

It seems superfluous to dwell upon this argument of appellant as having any bearing upon the subject now under consideration. The principles which they invoke are fully set forth in the case *In re Neagle* (135 U. S., 1). In the very extended discussion contained in that case, and by the citations given, the argument and conclusion of this court were in support of an executive power and duty to *protect* the agencies and the property of the United States against unlawful invasion or assault. Counsel for the appellant so understand the case, for they conclude from it that "the Executive is authorized to exert the power of the United States when he finds it is necessary for the *protection* of the agencies, the instrumentalities or the property of the government." And they add: "This does not mean an authority to disregard the wishes of Congress on the subject, when those wishes have been expressed." (Appellant's Brief, p. 88.)

We fully agree with counsel on this particular subject. This duty of protection of the agencies and property of the United States *is* incident to the executive office, but it is a protection under and in accordance with the law, and in fulfillment of the executive duty to take care that the laws be faithfully executed. This duty surely does not extend to a protection of some supposed future interest *against Congress itself.* In the case now under consideration the wishes of Congress *have been expressed.* Only twelve years be-

fore the withdrawal order of September 27, 1909, Congress had passed, and the President had approved, the act already mentioned, which provided "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims." A general act of Congress which had been in operation only twelve years, but under which rights were almost daily accruing down to the very moment of the making of the withdrawal order, cannot be called "obsolete." To say that in order to "protect" the property of the United States this law should be suspended, and all persons, although qualified, should be prohibited from doing the very things authorized by Congress, cannot be supported by the authorities cited by appellant.

The fallacy in this part of appellant's argument lies in the assumption that this executive power of "protection" extends to the prevention of acts by citizens which are in the exercise of rights especially granted by statute, on an executive theory that the statute itself is "unwise." No court has ever yet carried the duty of executive protection to this extent.

The answer to this contention of the appellant may be summed up by a few words taken from this court's opinion in *Kendall vs. United States* (12 Peters, 524, 613), already cited:

> "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power *to forbid their execution,* is a novel construction of the constitution, and *entirely inadmissible.*"

VII.

The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom lands reserved "by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes.

Words of the character here mentioned are cited by Justice Field in the case of *Grisar vs. McDowell, supra*, as evidencing a recognition of the authority of the President as applied to the case then under consideration, and to sustain the authority of the President "to order from time to time, as the exigencies of the public service required, *parcels* of land belonging to the United States to be reserved from sale and set apart for *public uses*."

Grisar vs. McDowell, 6 Wall., 381.

These expressions are used in certain statutes making specific grants of non-mineral land. They are used in the pre-emption acts of May 29, 1830 (4 Stat., 420), and of September 4, 1841 (5 Stat., 453). As we shall hereafter see, they have never been used in laws granting the right of private acquisition of mineral lands. These provisions in the acts in which they do occur are amply explained and justified, if not absolutely required, by statutes which had gone before.

As we have already seen, the President of the United States *by authority of Congress* had in numerous cases been empowered at his discretion to select

lands for specific public uses, and by proclamation or order to reserve such lands from sale. The proclamation or order under such statutory authority would have the same effect to create a reservation as would a specific act of Congress designating the lands for that purpose (*Wilcox vs. Jackson, supra*). It therefore seems unnecessary to seek for some meaning in these words of exception other than a recognition of the fact that there might be reservations made by proclamation or order under the authority of previous statutes. If, then, a new statute authorizing the private acquisition of public lands, or making a grant to a railroad or a state, did not make an exception of lands reserved by such proclamations or orders under such previous statutes, then the new statute might well be construed as revoking the authority theretofore given to the executive officer to make such reservation. A statement of the exception might well be deemed necessary to maintain in force an authority already given.

While we consider that the suggestions here made furnish sufficient explanation for the presence of such words in the statutes referred to, yet, if there had not been any such *previous* authorization to the President, then we submit that the only effect of such exceptions would be that the right to reserve by executive proclamation or order would apply to lands covered by the statute containing the exceptions, and *to them only*.

It is certainly contrary to the rules of statutory construction to say that the expression of a given right or reservation in one statute relating to one class of subjects should, by reference, or by some general theory of policy, be considered as included in some

other statute relating to another class of subjects from which the words are carefully omitted. The pre-emption law applied to *non-mineral* lands, and qualified citizens were permitted, under the terms of the statute, to acquire these lands by settlement, occupation, the making of entry in the land office, and the paying of certain fees; and from such *non-mineral* lands are made certain exclusions, including lands which have been reserved by order of the President. Now, surely, this provision, in such a statute, as to a reservation by order of the President cannot be held to control the provisions of another statute (in our case the mining laws) which grants the right to enter lands of a different character, and contains no corresponding words of reservation. To hold that the exceptions of the first statute extended to the second would be a violation of well-established principles of statutory construction.

> "If, in a subsequent statute on the same subject as a former one, the legislature uses different language in the same connection, the courts must presume that a change of the law was intended."
>
> Black on Interpretation of Laws, p. 191.

Chief Justice Marshall, speaking for this court, has said:

> "It is the province of the legislature to declare in explicit terms how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply

the rule to the case thus explicitly described —not to some other case which judges may conjecture to be equally dangerous."

The Paulina's Cargo, 7 Cranch, 52, 60.

"Where the Constitution speaks in plain language, in reference to a particular matter, we have no right to place a different meaning on the words employed because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to *other* subjects."

Cantwell vs. Owens, 14 Md., 215, 226.

Speaking of the words of a later statute, the Supreme Court of Pennsylvania says:

"That they differ from the words of a prior statute on the same subject, is an intimation that they are to have a different and not the same construction, for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law."

Rich vs. Keyser, 54 Pa. St., 86, 89.

Speaking of two different statutes dealing with the same subject-matter, an English case says:

"If one uses distinct language imposing a penalty under certain circumstances and the other does not, it is always an argument that the legislature did not intend to impose

a penalty in the latter—for where they did so intend they plainly said so."

Dickenson vs. Fletcher, L. R. 9 C. P., 1, 8.

Speaking of different provisions of law, a very ancient English case says:

"And the several inditing and penning of the former part concerning distress given to executors, and of this branch, doth argue that the makers did intend a difference of the purviews and remedies, or otherwise they would have followed the same words."

Edrich's Case, 5 Rep., 118; 77 English Reports (Full Reprint), 238.

See also:

Moser vs. Newman, 6 Bingham, 556; 130 English Reports (Full Reprint), 1395.

Speaking of a change of words in a statute, this court, after discussing the terms of the statute referred to, says:

"It will be observed, therefore, how general and comprehensive the first clause of Sec. 5339 is, and in comparison how restricted and special is subdivision three of Sec. 272. In other words there is omitted from the latter the words by which, we have seen, it was decided in *Winston v. United States*, *supra*, that the act of January 15, 1897, supra,

which was the first legislation giving the power to a jury to qualify their verdict, was applicable to the District of Columbia.

A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words 'any lands reserved or acquired for the exclusive use of the United States,' used in Sec. 272, would be regarded as the equivalent in meaning of the words 'district of country under the exclusive jurisdiction of the United States,' used in Sec. 5339. And yet it is mainly on those words in Sec. 272 that appellant relies. The District of Columbia can hardly be said, as we have pointed out, to be in any proper or adequate sense 'lands reserved for the exclusive use of the United States,' while the words 'district of country under the exclusive jurisdiction of the United States' can be, as they had been, properly and adequately held to include the District of Columbia."

Johnson vs. U. S., 225 U. S., 405, 415-416.

See also:

U. S. vs. Perry, 50 Fed. Rep., 743, 748; 1 C. C. A., 648.

In the next division of this argument we shall further urge the inapplicability of any such words of exception as are above mentioned in the consideration of rights to mineral lands under the mining laws. But upon the discussion already presented, and under

the authorities already cited, we confidently contend that these excepting words in certain statutes cannot support Petroleum Withdrawal No. 5 of September 27, 1909.

VIII.

Prior to June 25, 1910, neither the President nor the Secretary of the Interior had any power to withdraw public MINERAL-OIL lands from location or entry under the existing mining laws.

In the foregoing discussion we have contended that *non-mineral* lands could be withdrawn from entry under the homestead or pre-emption laws only by authority of Congress directly expressed or clearly implied, and only to the extent required to comply with the congressional will. We have also contended (but not admitting the materiality of the matter) that actual reservations and appropriations of public lands for public purposes can be made only under statutory authority, or, in certain defined cases, in accordance with a long-continued congressional policy assumed by executive officers to constitute a *grant of power by Congress*, and this only as to designated parcels of land to be used for specified public purposes.

The conclusions already reached, largely based on decisions of this court, are inconsistent with the existence of any independent executive power to withdraw *mineral* lands from entry under the mining laws.

When, however, we come to consider the history of legislation in relation to mineral lands, and examine the existing statutes providing for their acquisi-

tion by private citizens, the argument becomes doubly conclusive against the validity of the withdrawal of September 27, 1909.

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1. *Prior to 1866 Congress Itself Had Reserved All Mineral Lands from Sale, and This Congressional Reservation Left No Opportunity During That Period for Any Withdrawal of Mineral Lands by Executive Authority.*

From the foundation of the government congressional legislation has made a radical distinction between lands which were valuable for minerals and other lands constituting portions of the public domain. This fact has been recited and illustrated many times by decisions of this court. The early legislative action of this character related to salt springs and to lead mines.

On May 18, 1796, Congress passed an act providing for the sale of lands of the United States in the territory northwest of the Ohio River and above the mouth of Kentucky River. (1 Stat. L., 464.) It provided for a survey, and required that "every surveyor shall note in his field book the true situation of all *mines*, salt licks, *salt springs* and mill seats which would come to his knowledge." These provisions are now incorporated in section 2395 of the Revised Statutes. Section 3 of the act provided for the reservation of every salt spring which might be discovered, together with a section of one mile square which included it. (Ibid., 466.)

In another act, of June 1, 1797 (1 Stat., 490), pertaining to grants of land appropriated for military

reservations and for certain other purposes, a similar reservation was made.

By act of March 26, 1804, providing for the disposal of public lands, it was provided that—

> "the several salt springs in the said territory, together with as many contiguous sections to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States."
>
> 2 Stat. L., 280.

In another act, which has several times been before this court for consideration, being the act of March 3, 1807 (2 Stat., 448), it was provided—

> "that the several *lead mines* in the Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States."

Provisions were made for leasing such mines. In the early legislation of Congress the word "mines" seems to refer to mineral deposits reserved and owned by the United States. In the original act creating the Interior Department it was provided—

> "that the supervisory and appellate powers now exercised by the Secretary of the Treasury over the lead and other mines *of the United States*, and over the accounts of the

agents thereof, shall be exercised by the Secretary of the Interior."

Act of March 3, 1849; 9 Stat., 396.

As early as 1840 this court said:

"It has been the policy of the government at all times, in disposing of the public lands, to reserve the mines for the use of the United States."

United States vs. Gratiot, 14 Pet., 526, 537.

In 1845, referring to the law of 1807 concerning lead mines, this court said:

"In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead-mine lands, or to come to the conclusion that the reservations of them can only be released by *special legislation* upon the subject matter of such reservations."

United States vs. Gear, 3 How., 120, 130.

The history of our legislation upon this subject was briefly reviewed by Mr. Justice Field in the case of *Deffeback vs. Hawke*, 115 U. S., 392, 400.

Text-writers give convenient summaries of this history. Thus it is said in Barringer & Adams on the Law of Mines and Mining, page 194:

> "From the foundation of the government until 1866 the settled policy of the United States was not to part with the ownership of its mineral lands. From every grant they were reserved, so that the courts took the view that from this policy an intention to do so was implied in all cases."

Mr. Curtis H. Lindley, in the first volume of his valuable work on Mines (sec. 47, 2nd ed.), after review of the subject, says:

> "Sufficient historical data has here been given justifying the conclusion reached by the courts in announcing the doctrine that prior to 1866 it had been the settled policy of the government in disposing of the public lands to reserve the mines and mineral lands for the use of the United States. Prior to that date uniform reservation of mineral lands from survey, from sale, from preemption and from all grants, whether for railroads, public buildings or other purposes, fixed and settled the policy of the government in relation to such lands."

Prior to 1866 the mineral deposits of the public domain had not been placed under the jurisdiction of the General Land Office or of the Department of the Interior. All such mineral lands were reserved from sale by acts of Congress and pursuant to an established and well-recognized governmental policy. This being so, there could be no power of reservation left to be exercised by executive officers.

It necessarily follows that prior to 1866 no *implied* authority—arising from exceptions in statutes granting lands or permitting the private acquisition of lands, or arising from any authority given to the executive department as to non-mineral lands—would vest in the Executive as to *mineral* lands.

While mineral lands were a part of the public domain, yet they were withheld by Congress for governmental use. They were not "public lands," as that term is commonly used:

> "The words 'public lands' are habitually used in our legislation to describe such as are *subject to sale* or other disposal under general laws."
>
> Newhall vs. Sanger, 92 U. S., 761, 763.

No precedents arising prior to July, 1866, and no *practice* of executive officers of withdrawing public lands from entry or sale prior to that date, can have any bearing on the question now under consideration.

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2. *Since July, 1866, the Mining Laws Have Contained Complete and Exclusive Provisions as to the Control and Disposition of Public Mineral Lands.*

By act of May 5, 1866, Congress had recognized certain possessory rights acquired by citizens in mineral lands, but expressly provided that "nothing herein contained shall be so construed as granting a title

in fee to any mineral lands held by possessory titles in the mining states and territories." (14 Stat., 43.)

By act of June 21, 1866, Congress had extended certain rights under the homestead act, but in doing so expressly provided "that no mineral lands shall be liable to entry and settlement under its provisions." (14 Stat., 67.)

In the same year Congress made a provision as to mineral lands, which, with some modification, became thereafter section 2318 of the Revised Statutes, in the following words:

> "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law."

Here we have a statutory expression of the reservation of mineral lands, but with an exception which gives emphasis to provisions made for their disposition as being *expressly directed* by law.

Now, in the same year there came about a radical change in the policy of the government in relation to mineral lands, manifested by the act of July 26, 1866 (14 Stat. L., 251), which, with slight change of wording, so far as affects our present contention, was reenacted in the act of May 10, 1872 (17 Stat. L., 91), and soon afterwards became section 2319 of the Revised Statutes, and since 1872 has been constantly in force. That provision of law is as follows:

> "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and pur-

chase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

17 Stat., 91.

Congress had previously amended the act of July 26, 1866, and by the act of July 9, 1870, had made this further provision:

"That claims, usually called 'placers,' including *all forms of deposit*, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

16 Stat., 217.

This last-mentioned provision has become incorporated in the Revised Statutes as section 2329.

By the act of February 11, 1897, Congress provided:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils,

> and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."
>
> 29 Stat., 526.

Now, it will be observed that these statutes extend to *all* valuable mineral deposits in lands belonging to the United States, and to the lands containing such deposits, and provide that *any* qualified person may acquire petroleum lands under the mining laws. The sale of mineral lands, and their acquisition by private citizens, have been "expressly directed by law," and a right granted by law *can only be taken away by law*.

In *Deffeback vs. Hawke*, 115 U. S., 392, 404, Mr. Justice Field, after referring to the earlier mining statutes we have mentioned, thus summarizes them (the italics being his own):

> "It is there enacted that 'lands *valuable* for minerals' shall be reserved from sale, except as otherwise expressly directed, and that '*valuable* mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase."

We find in these statutes no reservation or exception. The words so frequently used in previous statutes relating to non-mineral lands, that there shall be excepted lands reserved by proclamation of the President, or lands reserved by order of the President, or lands reserved by competent authority, are not found in these statutes relating to the acquisition by citizens of lands containing mineral deposits. *Congress* could,

of course, at any time, by legislative action, before vested rights had accrued, reserve any lands, mineral or non-mineral, from the operation of previously existing laws. But if any executive authority had theretofore existed covering the power to withdraw other lands from entry or sale, such authority is expressly excluded in reference to mineral lands by the broad provisions of these statutes.

The statute of February 11, 1897, is what this court has called a "perpetual statute." Earlier acts relating to the acquisition of mining rights which we have quoted are of like character. This court has said:

> "The rule is that a perpetual statute (which all statutes are unless limited to a particular time) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an indication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon."
>
> United States vs. Gear, 3 How., 120, 131.

The act of February 11, 1897, must, therefore, continue to be the law until repealed by some other act of Congress, or by the enactment of some other law which has the effect of repealing it. There has been no such repeal, and no repugnant law has been enacted.

The only answer made to this contention is, apparently, that the President has the power to suspend the operation of a statute of the United States; in other words, by himself, and by inherent right, to exercise the powers of *legislation*. If the power to suspend exists, then the power to repeal exists, because a suspension, if valid, will continue until either the Executive, or Congress by new act, revokes the suspension. It may, therefore, continue for years, and by the very act of suspension of the operation of the law the President is exercising the legislative power of repealing a law.

The power claimed is a most startling one; for, if the power exists as to laws relating to the mineral domain, it exists in like manner as to other laws. As said by the Supreme Court of Illinois:

> "If it be considered that the President may reserve or appropriate the public domain to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects?"
>
> McConnell vs. Wilcox, *supra*.

As said by Secretary, afterwards Justice, Lamar:

> "To so hold would indicate that the Executive might in violation of law put in reservation for military purposes any amount of lands, and thus take them out of the operation of the general laws. To assert such a principle is to claim for the Executive the power

to repeal or alter the acts of Congress at will."

Fort Boise Hay Reservation, 6 L. D., 16, 18.

If a regulation of the Secretary of the Interior, who is vested with supervisory power over the public lands, to the effect that timber should not be taken from public lands for the purpose of smelting (although authorized by law for domestic uses), would be *legislation* as distinct from regulation (*U. S. vs. United Verde Copper Co., supra*), then to suspend altogether a plain, definite statute of the United States is also *legislation*.

If, as recently said by this court in *U. S. vs. George, supra*, it is indubitable that the sections giving supervisory power to the Secretary and to the General Land Office (secs. 441 and 453) confer an administrative power only, and that "under the guise of regulation, legislation cannot be exercised," then, surely, under these sections, the Secretary cannot suspend the operation of a public law of the United States; for this again would be *legislation*. The constitutional obligation of the President is to "take care that the laws be faithfully executed" (Art. II, sec. 2), and this court has said, as we have already quoted, that—

> "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."

Kendall vs. United States, *supra*.

Mr. Justice Brewer, speaking for this court, has said:

> "It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals, but that all in authority are guided and limited by those provisions which the people have through the organic law declared shall be the measure and scope of all control exercised over them."
>
> Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, 84.

Chief Justice Marshall, in the case of *Marbury vs. Madison*, said:

> "Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be the theory of this principle will never be maintained."
>
> 1 Cranch., 166.

Justice Miller, speaking for this court, says in the case of *The Floyd Acceptances:*

> "We have no officer in this government, from the President down to the most subordinate agent, who does not hold office under the law with *prescribed* duties and *limited* authority."
>
> 7 Wall., 666, 676-677.

On February 11, 1897, Congress, *by express direction of law*, provided for the private acquisition of mineral-oil lands under the mining laws. The act was on that day approved by President Cleveland. Within less than a month thereafter there was a new Chief Executive. Now, could President McKinley on March 5, 1897, have set aside this law by withdrawing from all location or entry the entire mineral-oil domain? If not (and argument for such power is entirely inadmissible), then did President Taft have such authority in 1909, in the conceded absence of any change of the law which either expressly or impliedly conferred such authority? If so, then just *when* and just *how* did he obtain such authority? The statute of February 11, 1897, was just as operative, just as immune from executive interference, on September 27, 1909, as it was on the day following its enactment. If the contention of the government in this case can be sustained, then it follows, as a logical sequence, that as often as Congress actually legislates, just so often may its will be immediately thwarted by the Executive "in aid of" other and different legislation which the Executive desires.

Upon the principles fully set forth in the foregoing discussion, and in the light of the strong, definite, and unambiguous language of the mineral land laws above quoted, we respectfully insist that, without some authorizing act of Congress, neither the President nor the Secretary of the Interior, prior to the 25th of June, 1910, had any authority to suspend, for any time whatsoever, the operation of the act of May 10, 1872 (now section 2319 of the Revised Statutes), or of the act of February 11, 1897, above quoted.

3. *Origin of the Practice of Withdrawing Large Areas of Public Lands from the Operation of Existing Laws.*

The practice of withdrawing large tracts of public lands from the operation of existing laws, without the support of a previous act of Congress authorizing the same, commencing, as it did, in the administration of President Roosevelt, and when Mr. Garfield was Secretary of the Interior, is fully explained by the views of Secretary Garfield, already cited, to the effect that—

> "full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed *wholly by the discretion of the executive*, unless any specific act has been *prohibited* either by the Constitution or by legislation."

President Taft's administration, inheriting this practice from its immediate predecessor, at first continued to make such withdrawals on the assumption that the Executive had power so to do, but, apparently, without any special investigation, until after the withdrawal had been made, as to whether such power in fact existed. It was under these conditions that Petroleum Withdrawal No. 5 was made on September 27, 1909. After that date the then Secretary of the Interior called upon the Assistant Attorney General for the Department of the Interior for his views as to the authority of the executive department to make such withdrawals of lands, and in April, 1910,

Mr. Oscar Lawler, then Assistant Attorney General, delivered to the Secretary of the Interior a very complete brief upon the subject, in which he came to the conclusion that the executive branch of the government did *not* possess this power of withdrawal without preceding congressional authority; the concluding words of Mr. Lawler's argument being as follows:

> "The President, in common with every other officer of the United States, is a creature of the law, subordinate and not superior thereto; his power to withdraw lands from disposition, like every other official act, must find justification in the source from which all authority must emanate—the law. The foregoing authorities show that it can find no such justification—hence it has no existence."

We have already shown, as indicated in the President's message of January 14, 1910, that he deemed it necessary for Congress to *ralidate* the withdrawals which had been made by the Secretary of the Interior and the President, in order to assure their legality. Senator Borah, in an address delivered in the United States Senate on the 11th of May, 1910, quoted from an address made by the President a few days before at Passaic, New Jersey, in which (with that freedom in taking the public into his confidence which was a characteristic of Mr. Taft) the President discussed the subject of the immense withdrawals that had been recently made, aggregating over sixty million acres, and spoke of the necessity of legislative action to approve these withdrawals, there being then

pending in Congress a bill for that purpose, which had passed the House, but had not passed the Senate. The President in that address said:

> "The absolute necessity of this act arises from the very grave doubt whether the reservation of sixty million acres, if subjected to the tests of legality in the courts, could stand it. It is a very grave question whether the Executive has the power to make reservations thus *in extenso, merely to avoid the disposition of the land under existing congressional enactment.*"

In view of the authorities already cited, and the principles already discussed, we would state it even more strongly than did President Taft, and say not only that there is a very grave doubt, but there is an actual certainty that the Executive has not the power to make such reservations, except upon authority previously granted by Congress.

Now, these large withdrawals, previous to the one made by the Secretary on September 27, 1909, were withdrawals of lands not controlled by the mining laws we have quoted; and the laws relating to the disposition of *non-mineral* lands did, for many years at least, contain the provision frequently cited in this argument, that there should be excepted from the rights given under the act such lands as should be reserved by order of the President; which exception, however, was made, as we have heretofore shown, for the protection of withdrawals made by the President under previously vested authority. But, as we have already persistently urged, the mineral-land laws do

not furnish even the doubtful argument which such acts relating to the non-mineral land might, by inference, have suggested; for as to the metalliferous and mineral oil lands, *all* of them without exception, with no suggestion of executive reservation, were declared to be open for entry by qualified persons, and every argument which could have been made to sustain the withdrawal of non-mineral lands absolutely fails when applied to the case of mineral oil lands.

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4. *No "Long-Continued Practice" or "Customary Usage" Can Be Found to Support the Withdrawal of Mineral Lands from the Operation of Existing Laws.*

We have already called attention to the fact that prior to the enactment of the mining laws, commencing in July, 1866, there was no possibility that any practice or customary usage of the executive department in reference to the withdrawal of lands could furnish an argument for the withdrawal of mineral lands, because such lands were already, by *legislative* action, reserved from any sale or disposition, and were held for government use or subsequent disposal by specific enactment. Congress then passed a law, already quoted, expressly declaring that "in all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law." Here was a renewed *legislative* reservation of all mineral lands from sale. Express directions of law were then made as to the disposition of mineral lands, and the mineral laws constitute a separate and distinct code of laws. The provisions for the private

acquisition of mineral lands are completely and radically different from any other laws pertaining to the acquisition of any other portions of the public domain. If, therefore, an argument is to be based upon a long-continued practice, or customary usage, of withdrawing lands from sale, such practice or usage must, in order to have a bearing on the present controversy, relate to *mineral* lands. We confidently state that prior to September 27, 1909, there had been no such practice, either long-continued or short-lived; that there had been no such usage, either customary or sporadic.

The appellant attempts to answer this contention by saying that by executive authority there have been some *appropriations* of lands for military reservations, or *some setting apart of specific lands* for occupancy by the Indians, and that such appropriated lands sometimes contained mineral deposits.

In support of this contention counsel cite *Gibson vs. Anderson*, 131 Fed. Rep., 39, and *Behrends vs. Goldsteen*, 1 Alaska, 518, 524. In both of those cases there had been an actual appropriation and occupation of lands for recognized public uses. We have already commented upon Gibson vs. Anderson. In the case of Behrends vs. Goldsteen the court outlines the acts and documents evidencing the appropriation, and says:

> "Did the action of the naval officers, including that of the Secretary of the Navy * * * together with the *continuous possession* and *occupation* up to the present time * * * present such acts and evidence as under the authorities *constitute a reservation?*" (pp. 523-524).

The court held that they did.

Our argument does not imply, and we do not contend, in cases where lawful appropriations of land have been made for specific public purposes, that any lands included in such areas lawfully appropriated and reserved are excluded from the appropriation or reservation by reason of the fact that they are found to be valuable for mineral. The integrity of the appropriation or specific reservation for a public use does not depend upon that question. The rule in such cases we have already quoted, as set forth by this court in *Scott vs. Carew, supra.* It is—

> "the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some *special public purpose* have been *in accordance with law* taken full *possession* of by and are in the *actual occupation* of the government."

What we contend is that there has never been a practice and never been a usage on the part of executive officers of *withdrawing* public *mineral lands* from location or entry under existing laws. Vast withdrawals of public lands were made during the administration of President Roosevelt. Whether lawfully or unlawfully withdrawn it is immaterial for us in this case to consider, because they were in all cases the withdrawal of lands from *agricultural* entry. That administration, notwithstanding the doctrine promulgated by Secretary Garfield, did not attempt to

withdraw the mineral lands from the operation of existing laws. The order of September 27, 1909, being the order now under consideration, was the first order of this character. It is not only unsupported by any *practice* or *usage*, but it is without precedent. The question as to its validity must be determined upon its own merits, when compared with the laws which it attempts to suspend.

We submit as indisputable propositions:

(1) That to withdraw large tracts of the public mineral domain from the operation of the acts of May 10, 1872, and of February 11, 1897, was to suspend the operation of those laws.

(2) That to so suspend the operation of laws is *legislation*—not regulation.

(3) That neither the President nor the Secretary of the Interior possesses legislative power (except as to the President's power of veto).

(4) That prior to June 25, 1910, Congress gave no power to either the President or the Secretary to suspend the operation of the acts above mentioned, or to deprive citizens, even for a single day, of rights conferred by those laws.

Therefore, the order of September 27, 1909, was wholly void, and could not prevent the location and acquisition, by qualified citizens, of claims on mineral oil lands, in the manner then prescribed by law.

IX.

The act of June 25, 1910, did not validate any previous withdrawal, it did not authorize the ratification or confirmation of any such previous withdrawal, and the withdrawal order of July 2, 1910, did not affect any rights previously acquired under existing mining laws.

1. *The Act Did Not Validate, or Authorize the Validation of, Any Previous Withdrawals.*

After the withdrawal of September 27, 1909, and at the opening of the next session of Congress, there was submitted the report of the Secretary of the Interior for the year 1909. In that report the Secretary of the Interior states that—

> "if material progress is to be made in securing the best use of our remaining public lands Congress must be called upon to enact remedial legislation."
>
> Report, p. 8.

After treating of coal deposits and recommending the leasing of coal lands on specified terms, the Secretary says:

> "The above suggestions with reference to the disposition of coal deposits are equally applicable to the oil and gas fields in the public domain, and *similar legislation* as to lands containing the same is hereby recommended."
>
> Report, p. 9.

The Secretary also states that he has recently withdrawn temporarily, for the purpose of submitting the subject to Congress for "new legislation," large areas of oil lands, of which he gives a table, and he calls attention to the importance of asking Congress—

> "to authorize the Executive to reserve certain areas of these lands for the purpose of affording a supply of fuel oil for the future uses of the Navy, and to make such regulations as may be necessary for the preservation and extraction of such deposits."
>
> Report, p. 11.

He later gives a table which "does not include lands withdrawn under specific statutory authority," showing the withdrawal up to November 1, 1909, of various areas of lands of varying character, aggregating 62,115,242 acres and including oil lands to the amount of 3,621,062 acres; and then he adds:

> "As the legal authority of the Secretary of the Interior to make even temporary withdrawals of public lands, for the purpose of submitting to Congress what may appear to the Secretary as an exigency requiring new legislation applicable to their proper use and disposition, has been questioned, it is recommended that Congress give specific authority to make temporary withdrawals of public lands in such cases."
>
> Report, p. 16.

President Taft sent a special message to Congress, on the subject of conservation of natural re-

sources, on January 14, 1910. In that message he makes the statement already quoted, to-wit:

> "The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public *with the hope that Congress might affirm* the action of the executive *by laws* adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the executive, and the question as to what the executive is to do is,under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to *validate the withdrawals* that have been made by the Secretary of the Interior and the President, and to *authorize* the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise."
>
> Message, pp. 4 and 5.

Later in the same message the President, after alluding to the report of the Secretary of the Interior above mentioned, says:

> "I earnestly recommend that all the suggestions which he has made with respect to these lands shall be embodied in statutes, and

> *especially* that the withdrawals already made *shall be validated* so far as necessary, and that the authority of the Secretary of the Interior to withdraw lands for the purpose of submitting recommendations as to future disposition of them where new legislation is needed shall be made complete and unquestioned."
>
> Message, pp. 8 and 9.

Now, in response to these urgent appeals of the President, what did Congress in fact do?

There were then pending in Congress a number of bills relating to the control and disposition of public oil lands of the United States. The appellant, in the appendix to its brief (p. 123), gives a list of six such bills which were pending before this special message of the President was sent to Congress. After that message was sent to Congress, and commencing on January 18, 1910, other bills were introduced, which the appellant also lists in the appendix to its brief. Between January 14, the date of said message, and April 19, 1910, seventeen new bills were introduced in the House and Senate bearing upon this subject, as so listed by the appellant, including House Bill No. 24,070, introduced April 5, 1910, upon which extensive hearings were held on May 13 and 17, 1910, being the hearings to which reference is made in appellant's brief.

One of these bills did actually pass the House and was sent to the Senate. It gave authority for the withdrawal of public lands from location, settlement, filing, and entry "for public uses or for examination

and classification to determine their character and value," and, when in his judgment public interest requires it, the President was by that act authorized to withdraw lands, whether classified or not, and "submit to Congress recommendations as to legislation respecting the lands so withdrawn." That bill as so passed by the House expressly provided that "all withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act."

H. R. No. 24070.

Congress was not neglectful of the subject. The number of bills introduced, as above stated, shows the interest which had been aroused. But there was a great difference of opinion in Congress as to the merits of the recommendations of the President in reference to the change of existing laws. Majority and minority reports of committees were made, and the subject was very extensively debated. We have already alluded to the speech of Senator Borah, delivered in the Senate on May 11, 1910.

Whatever may be the opinions of committees, either the majority or minority, and whatever may be the private views of individual senators or representatives, the will of Congress is only to be determined by the actual resultant legislation, and legislation did result in this case in the act of June 25, 1910 (36 Stat. L., 847), entitled: "An Act *to Authorize* the President of the United States *to make* withdrawals of public lands in certain cases."

This was the only legislation which resulted from the numerous bills that had been introduced, or pur-

suant to the urgent recommendations of the Executive and the Secretary of the Interior. The first section of that act provided as follows:

> "That the President may at any time in his discretion temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for *water power sites, irrigation, classification of lands,* or *other public purposes, to be specified in the orders of withdrawals,* and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."

This enactment speaks only *in futuro.* It is not in any respect retroactive. This court has said:

> "As a general rule for the interpretation of statutes it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."
>
> Murray vs. Gibson, 15 How., 420, 423.

> " * * * it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears."
>
> McEwen et al. vs. Den, Lessee, 24 How., 242, 244.

See also:

Harvey vs. Tyler, 2 Wall., 328, 347.
Sohn vs. Waterson, 17 Wall., 596, 599.
Twenty Per Cent Cases, 20 Wall., 179, 187.
Chew Heong vs. U. S., 112 U. S., 536, 559.

Now, this act of June 25, 1910, contains no validating or ratifying words whatever as to previous withdrawals. The ratifying words, contained in the bill as it passed the House, were stricken out in the Senate. The act, as passed and approved, gives no authority to the President or Secretary of the Interior to validate any such previous withdrawals, and, on the contrary, it very carefully abstains by express provision from any ratification of previous withdrawals. In the second section of the act we find this clause:

> "And provided further that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands *after* any withdrawal of such lands made prior to the passage of this act."

We call the attention of the court at this point to the fact that the rights of the appellees in this case come strictly within the words of this proviso, for the rights to be determined in this case are "asserted rights or claims initiated upon" oil lands *after* the withdrawal of September 27, 1909, and *prior to* the passage of the act of June 25, 1910.

In the course of the debate upon the bill resulting in this act, Senator Nelson called attention to this clause, and he said:

> "I am aware of the fact that the men who occupied these oil fields out there [referring to California] did so after the lands were withdrawn under the former administration. They questioned that withdrawal, and it is possible the courts may sustain them and hold that the withdrawals were illegal; but whatever the law of the case may be *this bill does not attempt to interfere with that.* It leaves them with their rights to be adjudicated *just as though this bill never became a law.*"
>
> Cong. Rec., Vol. 45 (Part 7), p. 7474.

Senator Nelson also made the further statement in the Senate, to-wit:

> "The bill contains this further provision: 'And provided further that this act shall not be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands under any withdrawal of such lands made prior to the passage of this act.' Thus it is intended to leave the door perfectly open for those people who went on to oil lands in California that were withdrawn under the former administration. It leaves them exactly with the rights they think they have under existing laws."
>
> Cong. Rec., Vol. 45 (Part 7), p. 7475.

The purpose of the act of June 25, 1910, was manifestly to leave to the courts to determine whether or not the withdrawal of September 27, 1909, at the time it was made, was valid. If it was not valid, rights initiated during the period of withdrawal, it is expressly provided, shall not be *abridged*.

That the date of the act was to be the point of time from which there was legislative restriction of the right of location and entry of oil lands is clearly shown by an amendment to section 2 of the act of June 25, 1910, which amendment was approved August 24, 1912 (37 Stat. L., 497). The last-mentioned act amended section 2 of the act of June 25, 1910, so as to provide that all lands withdrawn under the act should nevertheless be open to exploration, discovery, location, and purchase under the mining laws, so far as the same apply to *metalliferous* minerals, and then amended the proviso we have above quoted so that the same should read as follows:

> "Provided, further, that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands *after* any withdrawal of such lands made prior to *June 25, 1910*."

It would seem, then, perfectly clear that such rights and claims as are now asserted by the appellees in this case, originating, as they did, after the withdrawal of September 27, 1909, and prior to June 25, 1910, are not affected by the act of June 25, 1910, and are to be construed by this court the same as if such act had not been passed.

2. *The Attempted Ratification of Previous Withdrawals Contained in the Order of July 2, 1910, Is Void.*

When we see that the withdrawal act of June 25, 1910, did not validate any previous withdrawal of public lands from the operation of existing laws, we are bound to conclude that that part of the order of July 2, 1910, which attempts to ratify and confirm previous withdrawals is in itself void. So much of the order of withdrawal, Petroleum Reserve No. 8, based upon the statute of June 25, 1910, as relates to the *then future* is doubtless valid, because it is made pursuant to statute, and from the date of that order, under the authority of the statute, the lands described are to be deemed withdrawn from settlement, location, sale, or entry, except where vested rights had then accrued.

The form of Withdrawal No. 8, like the form of the Order of Withdrawal No. 5, seems to have been prepared by the Director of the Geological Survey (Record, p. 9, fol. 10), and it seems to have been hard for him, in framing the withdrawing orders, to yield even to the plainly manifested views of Congress. He therefore attempts in the draft of "order of withdrawal Petroleum Reserve No. 8" to ratify and confirm the various previous withdrawals, commencing with the one of September 27, 1909. We submit that this was plainly beyond any authority given by the act of June 25, 1910; and that the President himself doubted the efficacy of the attempted ratification appears in the fact that the order also *withdrew* the same lands from future location or entry.

President Taft in his speech at the Conservation Congress in St. Paul, a copy of which speech he transmitted to Congress with his message of December 6, 1910, expressly stated that the act of June 25, 1910, did not validate the withdrawal orders made by him in September, 1909. He says:

> "The law as passed does not expressly validate or confirm previous withdrawals, and, therefore, as soon as the new law was passed I myself confirmed all the withdrawals which had theretofore been made by both administrations, *by making them over again.*"
>
> Message December 6, 1910, p. 92.

A confirmation of withdrawals which results from "making them over again" can, manifestly, apply only to the then future. It could not affect adverse rights which had arisen prior to the re-withdrawal.

Temporary Withdrawal No. 5, of September 27, 1909, was expressed to be for one purpose only, and that was "in aid of *proposed legislation* affecting the use and disposition of the petroleum deposits of the public domain." No other purpose whatsoever is given. Now, the purpose so indicated is not a purpose even recognized by the act of June 25, 1910. That act authorized the temporary withdrawal and reservation of lands "for water power sites, irrigation, classification of lands or other *public purposes to be specified* in the orders of withdrawal." There was good reason for omitting any reference to proposed legislation, because legislative matters rest entirely with Congress. The President, indeed, has the power, by message to Congress, to recommend legislation, as he

did recommend legislation upon this subject; but, except for the power of veto, this is the only relation which the President has to legislation, and no authority has ever been given by law to the President to suspend the operation of existing laws of Congress because the President himself desires to recommend to Congress the enactment of some other legislation which would be different from that which was then in force. Otherwise the entire public domain would be controlled by what the President for the time being might think *should be the law*—not by what Congress has said it shall be.

We have already called attention to the fact that President Taft recognized these withdrawal orders, including that of September 27, 1909, as having the effect of suspending the operation of existing laws. His language upon that subject is found in his message of December 10, 1910. Speaking of this very act of June 25, 1910, he says:

> "At its last session this Congress took most useful and proper steps in the cause of conservation by *allowing* the executive, through withdrawals, to suspend the action of the existing laws in respect to much of the public domain."
>
> Message, pp. 56-57.

This language is peculiarly significant, in showing not only that the withdrawal was the suspension of the operation of existing laws, but that the President himself considered his authority in making withdrawals resulted from Congress "allowing" this power

to the Executive. (No such power had been *allowed* by Congress prior to June 25, 1910.)

The difficulty with the executive officers who have managed these withdrawals—and they seem to emanate from the Director of the Geological Survey—is a difficulty which is too prevalent at the present day. Officers whose duties are purely *administrative* suddenly conceive that it is desirable to change national *legislative* policies; and, *presto*, the change must be *immediate*. They are unwilling to await the orderly processes of the law. Congress admittedly has complete and exclusive power over the public lands, mineral and non-mineral. Congress is in session every year, and for a large part of the time. The President can any day, when it is in session, send it a message with his recommendations (or appear before it in person). If the necessity for action is urgent, he can call attention to the urgency, and Congress is at hand, ready to do whatever it shall deem needful for the preservation or disposal of the public domain. If it is not in session, it can be convened on short notice. To say on September 27 that it is necessary to immediately withdraw from the operation of long-existing land laws more than three million acres of mineral land, being all the known mineral-oil land of the country, and to do so by executive fiat, when it is known that early in the following December Congress will be in session, that the President can make his recommendations, and that congressional action can be speedily taken—as speedily as *Congress* shall see fit—is to manifest an utter disregard of constitutional and legal restraints. The only safe rule is for the different branches of the government to keep within those lim-

itations which the Constitution and the laws have prescribed for their guidance and direction; otherwise government will advance through chaos to despotism.

We respectfully insist that the act of June 25, 1910, and the order of July 2, 1910, can have no effect as against the vested rights acquired by the original claimants mentioned in the present bill, which rights had been acquired as early as May 5, 1910.

X.

Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by act of Congress, much less by an executive order.

The only attack made in the bill upon the rights of the appellees and their grantors is based upon the proposition that the lands which were entered upon had been lawfully withdrawn by the order of September 27, 1909, and that, therefore, citizens could not acquire any rights therein under the mineral-land laws.

If we are right in the contention we have so extensively argued, that the order of withdrawal of September 27, 1909, was wholly void, then the question will arise as to whether the rights acquired in the meantime were of such a character as would be protected against subsequent legislation or authorized executive orders.

It must be assumed, for the purposes of this case, that the original claimants were qualified to enter

public lands under the mining laws. There is not a suggestion made that they were not so qualified. It is a general proposition that the allegations of a pleading must be construed most strongly against the pleader. If there was any reason for assailing the rights of the original claimants by reason of any disqualification in law to make the entry, that fact should have been alleged. It is not alleged. The presumption is in favor of the qualification of the parties making the location and discovery, and it is not contended in this case that this presumption is not a conclusive one for the purpose of this hearing.

Such being the case, what are the facts as appearing in the bill? They are: that the appellees' grantors, called "original claimants," entered upon the land in controversy as a part of the mineral oil domain of the United States, and open to location under the mineral-land laws, as early as March 27, 1910; that they worked diligently; sunk a well to a great depth, and necessarily at great expense; that in this well on May 5, 1910, they had discovered mineral oil in great quantity, and of great value; and that, the discovery having been made, they filed their location certificate in the proper office. Now, assuming that the claimants were qualified citizens of the United States, or persons who had declared their intentions to become such, and assuming, as we must, in view of this discussion, that these mineral lands were subject to entry, and had not been lawfully withdrawn from the operation of the mineral-land laws, then it is very clear that, before the enactment of the law of June 25, 1910, the rights of the locators had been perfected in the manner contemplated by the mineral-land laws; and while

there is no allegation in the bill that they had applied for final entry in the land office, or obtained receiver's receipt, yet the allegations of the bill do show that the grantees of the original claimants were continuously in possession of the property, and still continue in such possession. We have, therefore, the elements (1) of location by presumably qualified locators; (2) work performed in perfecting the location; (3) discovery of the mineral in paying quantities, showing the land more valuable for the mineral oil produced than for other purposes; (4) the filing and recording of location certificate; and (5) continued assertion of right and continued possession up to the time of the bringing of this action.

Now, under these facts, what is the law as to the rights of the locators and their grantees? The decisions of this court are not silent upon the subject.

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S. 762. * * * The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time."
>
> Belk vs. Meagher, 104 U. S., 279, 283.

> "A valid and subsisting location of mineral lands, made and kept up in accordance

with the provisions of the statutes of the United States, has the effect of a *grant* by the United States of the right of present and exclusive possession of the lands located."

Gwillim vs. Donnellan, 115 U. S., 45, 49.

Speaking of placer-mining claims, this court says:

"Such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 U. S. 279, 283, 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' *It is not, therefore, subject to the disposal of the government.*"

Noyes vs. Mantle, 127 U. S., 348, 353.

In a later case, this court, after quoting in full section 2319 of the Revised Statutes, then continues as follows:

"And by Section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to the possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without in-

fringing the title of the United States, and that *when a location is perfected* it has the effect of a *grant* by the United States of the right of present and exclusive possession." (Citing cases.)

Manuel vs. Wulff, 152 U. S., 505, 510-511.

See also:

1 Lindley on Mines, secs. 169, 539.

1 Snyder on Mines, secs. 451, 466.

Mr. Justice Van Devanter, of this court, when Assistant Attorney General for the Department of the Interior, had occasion to discuss this subject in giving an opinion on the act creating the forest reservation known as the Yosemite National Park. A proviso in that act excepted any *bona fide* entry made on the land prior to the approval of the act. In the case then under consideration there had been "a mining claim duly *located* and held in compliance with the mining laws at the date of said act," but there had been no "entry" of that mining claim. In the opinion it is said:

"The right to the possession and use of such a claim, and ultimately to perfect title to the same in accordance with the mining laws, was a property right, and was just as much protected by the constitutional guaranty that private property shall not be taken for public use without just compensation

as was 'any bona fide entry' mentioned in said proviso."

25 Land Decisions, 48, 51.

The mining claim located and held by the grantors of appellees, being the land now in controversy, on the 5th day of May, 1910, was their *property*, and their property right was protected by our fundamental law; for it is provided in the Fifth Amendment to the Constitution of the United States that no person shall "be deprived of life, liberty or *property* without due process of law."

XI.

Sundry comments on the argument of appellant.

We have attempted in the preceding pages completely and fairly to cover all phases of the question here involved, but, after receiving the printed argument of appellant, a few additional suggestions seem pertinent.

1. The appellant contends "that a reservation by the President will be upheld if it may be upheld on any *possible hypothesis.*" (Brief, p. 6.)

This very statement shows the weakness of appellant's cause. It recognizes the fact that it must go outside of the Constitution and outside of the laws to find some "hypothesis" on which to base a plausible (possible?) argument in support of this withdrawal. But, as "we have no officer in this government from the President down to the most subordi-

nate agent who does not hold office under the law, with prescribed duties and limited authority" (*The Floyd Acceptances, supra*), it is manifest that the President's authority in this case must find its source in the law; otherwise it does not exist.

2. Counsel say that at the time of the withdrawal order "there was an *emergency;* there was no time to wait for the action of Congress." (Brief, p. 11.) Wherein was there such an "emergency"? There were then several millions of acres of unappropriated and unlocated oil lands on the public domain. Only a trifling portion of this vast area would be needed for naval use, even when Congress should authorize such use. These oil deposits were not newly created, nor even newly *discovered.* No customary use of the government was being in the slightest degree restricted or infringed. If private citizens produced oil, they would produce it for sale, and the government could still, as it was then doing and always had done, purchase what it needed. The law also then provided an adequate method for the private acquisition of oil lands—that law still continues to the present day. Did the executive view that this long-existing law was unwise constitute an "emergency"? If the term "emergency" can be used as to this withdrawal, it can be used in support of *any* action the President may take in suspending the operation of existing law.

3. Appellant contends that the action of the President is justified because bills on the subject were then pending in Congress. (Brief, p. 12.) "The whole subject was before "Congress." (Brief, p. 13.)

How different is the situation here presented from that revealed in the *Bullard* case! (*Supra*, p. 68.) In that case, pursuant to supposed antecedent authority of Congress, specific lands had been withdrawn to satisfy a grant. The grant was to a state. There were great differences of opinion among heads of department as to the scope of the grant. After decision by this court, bills were introduced in Congress which resulted in giving to the state the whole amount of lands originally withdrawn. In the meantime the original withdrawal had never been revoked. In our case there was no antecedent authority, either express or implied—no authority to be construed either rightly or wrongly. There was no accompanying grant of lands. There was no appropriation of land for government use. There was no setting apart of specific lands for any public purpose. The order of September 27, 1909, was simply an unheralded withdrawal of the entire mineral-oil domain from the operation of existing laws. To say that the mere pendency in Congress of bills (which, *if enacted into law*, would give the power of withdrawal) would give such power *in advance* of the enactment of laws, involves peculiar reasoning. Under this theory, whenever the President thinks an existing law should be changed, all he has to do is to have some administration member introduce a bill on the subject, and then straightway, without awaiting congressional action on that bill, he may suspend the operation of existing laws on the subject. We respectfully submit that no such derivation of executive power can be sanctioned by the courts.

4. Appellant's counsel, speaking of the act of June 25, 1910, say:

> "Its necessary import is to approve the policy of reserving the oil and the other minerals specified, and to approve the reservations previously made."
>
> Brief, p. 13.

We have fully discussed the proposition that that act *did not* approve the reservations previously made, but expressly avoided doing so. But what is to be said of counsel's contention that the act approved the *policy* of reserving oil and the other minerals specified? This suggestion of counsel is at least peculiar, in view of the nature of the issue in this case. We find no fault with any *congressional* policy in *authorizing* withdrawals of mineral lands from the operation of previous laws. That is a proper function of Congress. We have so contended throughout this argument. The question here is not as to the wisdom of a *policy* of withdrawing oil lands from entry. The question is: Could the President lawfully order such withdrawal, without previous authority from Congress? The fact that Congress did in 1910 give the President power to make such withdrawals is surely no argument that he had that power in 1909. True reasoning from the premises would lead to the exactly opposite conclusion. If it was necessary for Congress to give him such authority, it was because he did *not* possess it until it was granted by Congress.

5. Appellant's counsel quote Justice Story as placing the slowness of the processes of

Congress among the reasons for not giving it control of the *army and navy*, and for lodging the *pardoning power* with the President. (Brief, p. 71.) Justice Story was giving reasons why the framers of the Constitution distributed the governmental powers as they did. But the same framers of the Constitution made an entirely different provision concerning the public lands, and placed the power to control and regulate such lands exclusively in Congress. In the opinion of the makers of the Constitution, "the slowness of the processes of Congress" furnished no reason for taking from Congress the power in all respects exclusively to control the public lands.

6. Speaking further of the delays in Congress, the counsel for appellant say:

> "This procrastination and the *public notoriety* which attends their deliberations unfit such bodies for the performance of those acts of government which demand *celerity*, and for those also which demand *secrecy in preparation*."
>
> Brief, p. 71.

This language suggests the words of Justice James Wilson, who says:

> "The advantages of a *monarchy* are strength, dispatch, secrecy, unity of counsel."
>
> Wilson's Works, Vol. 1, p. 544 (Speech before Pennsylvania Convention, Nov. 26, 1787).

There are, indeed, those who think that more power should be vested in the Executive than our Constitution has placed there; that the President should have more the power of a *monarch* than our form of government accords to him. But we live under a Constitution which has worked well in the past—we believe will work well in the future. In any event, it is the ultimate and controlling law which limits the powers of officials and regulates and controls the rights of citizens. But, when the question involves a scheme of governmental policy in reference to the vast public domain, why is great haste necessary? Why should there not be "public notoriety" attending deliberations upon a subject which affects so many? Why should there be "secrecy in preparation" in matters which tend to overturn long-existing law?

The words of counsel on this subject suggest an additional objection to these executive withdrawal orders (not authorized by previous legislation). When a statute is amended, or a new public policy is inaugurated by Congress, the "public notoriety" which attends the deliberations of Congress has the effect of advising the people at large of what is being done, and they are prepared to receive and act upon the final legislative mandate. But when an executive withdrawal order is made (not authorized by previous statute), it *is* marked by "secrecy in preparation," and we may admit that it is marked by "celerity." But there is no provision of law for its publicity. There is not even any executive practice providing for its publicity. It rests in the archives of the Department of the Interior, with copies or orders sent only to the various *land offices*. The innocent prospector, relying

upon existing law, goes upon unappropriated public domain, prospects for mineral, thinks he finds oil, at very great expense sinks a well, and finds oil in paying quantity. He then goes to a land office, perhaps hundreds of miles distant, only to find that the land he has prospected has been withdrawn from entry, and that all his pains and labor are useless, and the money he has expended is lost. He finds himself suddenly the victim of a monarchical exercise of power, without previous notice, and in opposition to what he knows to be the law of the land.

We respectfully submit that the exercise of such executive power cannot be deemed valid in a country governed by laws, which themselves are subject to the Constitution, which is our supreme law.

XII.

The decision and opinion of this court will determine for the future the proper constitutional exercise of governmental functions of greatest importance.

The importance of this cause can hardly be magnified, and yet we do not rest its importance on the same grounds as do counsel for appellant.

From the standpoint of the government, the decision of this court will affect the ownership of various tracts of oil land located by private citizens under existing laws between September 27, 1909, and June 25, 1910. The number of locations made during that period of nine months must cover a very small acreage compared with the total of more than four million acres of oil land withdrawn from entry. If, by private

effort, oil is produced from such located lands, it becomes a part of the common supply for the industries and commerce of the country, and represents no actual loss to the people. (Of course, the question we have before us does not involve any suggestion of fraud in the acquisition of any of such located lands. If there are cases of fraud, such cases will stand and be adjudicated upon their own merits.) The government, as heretofore shown, has already made reservations of all the oil land it needs for naval uses. If, however, in the judgment of executive officers, more land is needed for that purpose (and the additional amount must be very limited), out of the vast unlocated areas there is still an abundance of oil lands which can be so utilized. Under the government's contention, in the light of the withdrawal orders and the documentary history produced before this court, the question merely is whether oil lands may be acquired under the existing law (act of February 11, 1897), or whether their private acquisition shall be delayed until Congress shall change its policy and resort to some leasing system. Whether it is desirable or undesirable that there should be such a change of method of disposition of mineral-oil lands is, of course, not a question before this court. It is a question purely for legislative determination. The discussions at the time of the pendency of the act of June 25, 1910, and the fact that now, more than four years after the withdrawal order of September 27, 1909, Congress has made no change whatever as to the method of private acquisition of oil lands, sufficiently show that Congress does not accept the views of the Executive as to the desirability of an immediate change of governmental policy upon

this subject. And members of the National Congress may well doubt the value of the suggested change of policy in view of past national experiences. During a period constituting nearly half of our national life we had a system of leasing mining lands. That system was found to be a failure, and on this subject we will simply refer to the message of President Polk, sent to Congress December 2, 1845, and to an address of Hon. Abram S. Hewitt before the American Institute of Mining Engineers, both of which are quoted quite fully in 1st Lindley on Mines (2nd edition), sections 33 and 34.

In view of the fact that under the act of June 25, 1910, the President has the power, which he has exercised, of withdrawing the entire public mineral-oil domain (on which vested rights had not then accrued) from the operation of the mining laws, the matter, we submit, is not of great importance to the government as to whether the comparatively few locations made in the period of nine months shall or shall not be invalidated.

But involved in this case there is a principle of vital importance, not only reaching to the administration of the public lands, but extending to the entire domain of statutory law. If, in a case like the present, where the Constitution by express terms vests the control of the public lands exclusively in Congress, the President may, without congressional authority, suspend a "perpetual statute" enacted by Congress for the disposition of mineral lands, and can say that such lands shall not be alienated at all, pending efforts to procure a change of the law, then we can conceive of no case where, upon the same principles, the Presi-

dent may not make a like suspension of laws, in the event that he should feel that the existing law on a given subject is unwise.

If the principle contended for by the government in this case is to be sustained, then to every statute passed by Congress there should be appended the words: "Unless the President shall otherwise direct;" or, if we accept the appellant's concession that Congress does have the power ultimately by new statute to overrule the executive suspension of previous laws, then to every statute we should add the words: "Subject to the right of the President to suspend the operation of this act at his discretion, if he thinks this law should be changed."

Within the last ten years there has been manifested from time to time a strong effort to concentrate more power in the Executive, at the expense, not only of the legislative, but of the judicial, department of our government. The success of appellant's contention in this case would strongly promote such efforts. We submit that the tendency is one which is dangerous to constitutional liberty, is revolutionary in its effect upon our form of government, and its natural course is in the direction of a change of our democracy to a monarchy. Our safety rests on the strict observance of that delimitation of powers and distribution of governmental functions between the three great departments which our Constitution has so wisely established. With due consideration of all progressive tendencies of the day, and of such wholesome changes as a spirit of reform may properly demand, yet, in matters committed by the Constitution to one department of the government and not to an-

other, the line of progress and the declaration of changes of policy should come through that department in which the Constitution has vested the power to change national policies. Our only security as to the *methods* of reaching desired changes is still to walk *super antiquas vias.*

Our discussion has covered a broad field, but it all tends to one point, and that is that the mineral-oil lands of Wyoming, including the lands owned by the appellees, were unlawfully withdrawn from entry by the order of September 27, 1909; and, such being the case, the decree of the District Court in this case should be affirmed.

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